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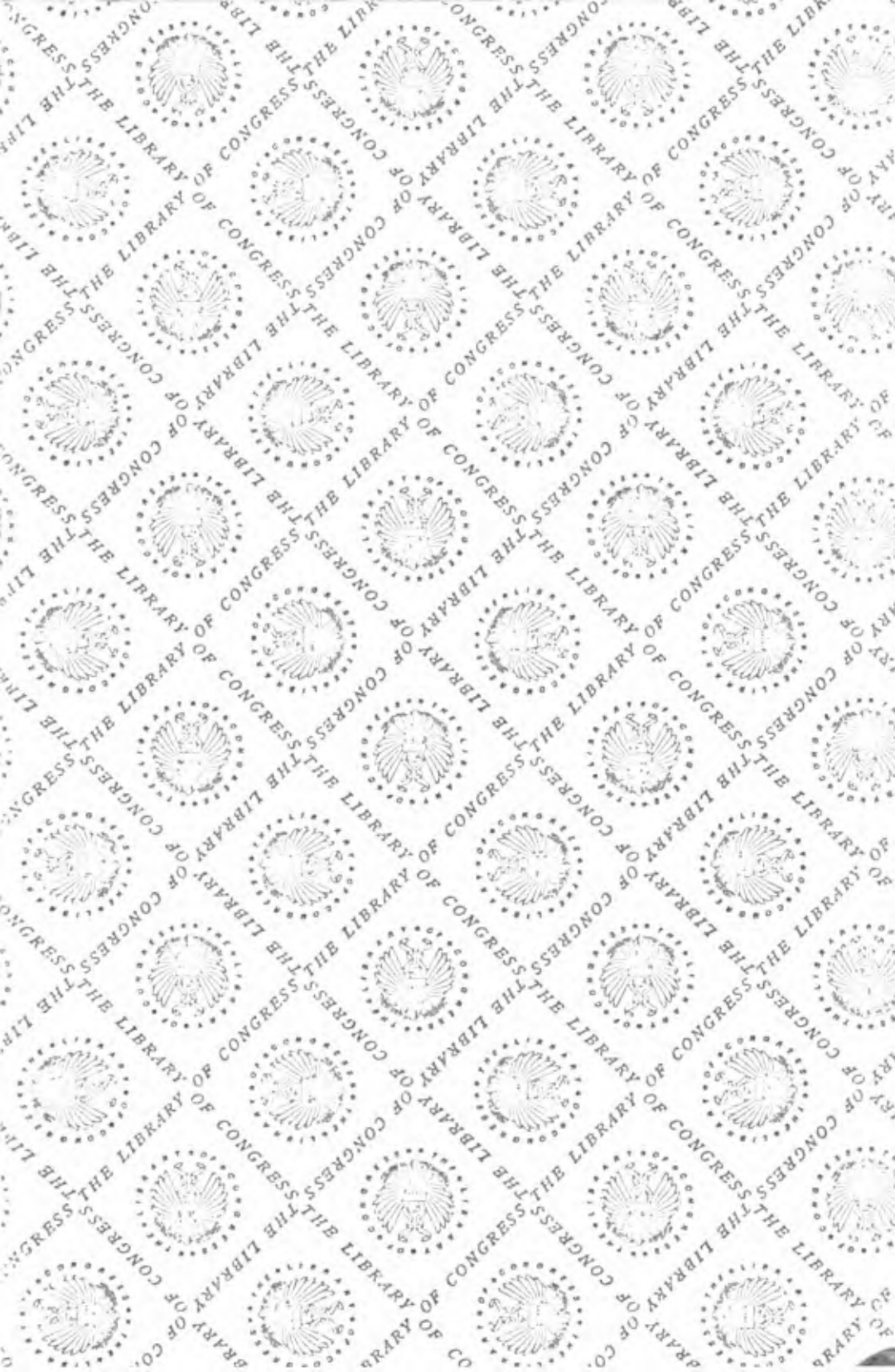
THE LIBRARY OF CONGRESS

BILL OF RIGHTS PROCEDURES ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

H.R. 214

BILL OF RIGHTS PROCEDURES ACT

JULY 13 AND 20, 1978

Serial No. 70

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

35-777 O WASHINGTON : 1978

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CONTENTS

HEARINGS HELD

WITNESSES

ADDITIONAL MATERIAL

BILL OF RIGHTS PROCEDURES ACT

THURSDAY, JULY 13, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, and Butler.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member, Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The subcommittee will please be in order.

I am pleased to convene today's hearings on H.R. 214, the Bill of Rights Procedures Act, legislation which the subcommittee has worked on over several sessions of Congress.

Indeed, over 4 years ago, in the broadening wake of repeated disclosures of illegitimate Government intrusions into the lives of citizens, the subcommittee began consideration of legislation placing limits on such Government activities.

During the 93d Congress we focused on wiretapping and other forms of electronic surveillance. Some of the fruits of that work are seen today in the Foreign Intelligence Surveillance Act which is moving forward to the House floor.

During the 94th Congress we resumed our work on surveillance techniques generally and after more than 20 markup sessions the bill before us today, H.R. 214, was drafted by the subcommittee.

H.R. 214 regulates the inspection by Federal agents of bank, telephone, and credit records, the conduct of mail covers by the U.S. Postal services, and amends certain sections of existing domestic wiretap laws.

We have not been alone in our work in these issues and on July 1, 1977, the Privacy Protection Study Commission issued its report to the President and Congress. Chapter 9 of the report, "Government Access to Personal Records and 'Private Papers' " makes seven recommendations for public and private policy on Government access to such records.

The recommendations of the Commission bear striking resemblance to the provisions of H.R. 214 and have given new impetus to the Congress and the administration to seriously consider this and similar proposals.

On Tuesday of this week the House Banking Committee, working with compromise language supported by the Department of Justice, favorably reported a privacy protection title to a larger banking reform bill.

I am encouraged by this action and hope we will be able to move forward with the Banking Committee in our efforts to regularize and codify procedures to assure that these most revealing of private records are adequately protected and that the Federal law enforcement apparatus has legitimate access to such limited records as it needs to pursue its criminal justice obligations.

As the President repeatedly stated during his campaign, his administration is committed to the "guarantee of maximum personal privacy for private citizens."

Here today to represent the administration position is the new Assistant Attorney General for the Criminal Division, Hon. Philip Heymann. Professor Heymann, I welcome you and congratulate you on your confirmation.

I believe this is your first appearance before this committee, if not before the House of Representatives, and we are pleased to have you with us.

[The bill follows:]

95TH CONGRESS
1ST SESSION

H. R. 214

IN THE HOUSE OF REPRESENTATIVES

JANUARY 4, 1977

Mr. KASTENMEIER introduced the following bill; which was referred jointly to the Committees on Banking, Finance and Urban Affairs and the Judiciary

A BILL

To require a subpoena or other judicial order prior to the inspection of bank, credit, or telephone toll records by an officer, employee, or agent of the United States, to regulate the use of mail covers, and to regulate the interception of wire or oral communications by communications common carriers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Bill of Rights Procedures Act of 1977".

TITLE I—CONFIDENTIALITY OF FINANCIAL, TOLL, AND CREDIT RECORDS

DEFINITIONS

SECTION 1. For the purposes of this Act:

(a) The term "financial institution" means—

(1) a bank or trust company organized under the laws of any State or of the United States;

(2) a savings and loan association or building and loan association, or homestead association organized under the laws of any State or of the United States;

(3) a credit union organized under the laws of any State or of the United States; and

(4) any other organization chartered under the banking laws of any State and subject to the supervision of the bank supervisory authorities of a State.

(b) The term "financial records" means any original or any copy of—

(1) any debit or credit to a customer's deposit or share account with a financial institution; or

(2) any record held by a financial institution containing information pertaining to a customer's relationship with the financial institution.

(c) The term "person" means an individual, partnership, corporation, association, trust, or any other legal entity organized under the laws of a State or the United States.

(d) The term "customer" means any person who is patronizing or has patronized a financial institution and who is utilizing or has utilized a service offered by that financial institution, or who is subscribing or has subscribed to the services of a communication common carrier, or who is utilizing or has utilized the services of a credit card issuer, or who is the subject of a consumer report assembled by a consumer reporting agency.

(e) The term "supervisory agency" means—

(1) the Federal Deposit Insurance Corporation;

(2) the Federal Savings and Loan Insurance Corporation;

(3) the Federal Home Loan Bank Board;

(4) the National Credit Union Administration;

(5) the Federal Reserve Board;

(6) the Comptroller of the Currency;

(7) the Federal Communications Commission.

(f) The term "communication common carrier" shall have the meaning given to "common carrier" in section 153 (h) of title 47 of the United States Code.

(g) The term "toll records" means tickets, lists, or other detailed records of individual calls or messages, telegrams and similar messages, and messenger service charges, whether or not used as a basis for billing to customers.

35-777 O - 79 - 2

(h) The term "credit card issuer" means any person which offers to the public any card, plate, coupon book, or other device which may be utilized in lieu of cash, check, or similar method of payment for the purpose of obtaining money, property, labor, or services.

(i) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third persons, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports as defined in the Fair Credit Reporting Act (Public Law 91-508, October 26, 1970, 84 Stat. 1136.).

(j) The term "credit records" means any record held by a credit card issuer which contains information pertaining to a customer's relationship with the credit card issuer or information relating to a customer contained in a consumer report assembled by a consumer reporting agency.

ACCESS TO RECORDS

SEC. 2. (a) No officer, employee, or agent of the United States, or any agency or department thereof, may obtain copies of, access to, or information contained in the financial records, toll records, or credit records of any other customer

in the posssession of a financial institution, communication common carrier, credit card issuer, or consumer reporting agency unless the records are described with sufficient particularity to identify the information sought and—

(1) such customer has authorized such disclosure in accordance with section 4;

(2) such financial, toll, or credit records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 5;

(3) such financial, toll, or credit records are disclosed in response to a search warrant which meets the requirements of section 6; or

(4) such financial, toll, or credit records are disclosed in response to a judicial subpoena which meets the requirements of section 7.

(5) such financial, toll, or credit records are disclosed in accordance with the requirements of section 604(3) A or C of the Fair Credit Reporting Act (Public Law 91-508, October 26, 1970, 84 Stat. 1136).

(b) Any customer whose records are subpoenaed pursuant to this Act shall have standing to move to quash or to seek other relief.

RESTRICTIONS ON THE RELEASE OF RECORDS

SEC. 3. (a) No financial institution, communication common carrier, credit card issuer, or consumer reporting

agency, or any officer, employee, or agent thereof, may provide to any officer, employee, or agent of the United States, or any agency or department thereof, copies of, access to, or the information contained in, the records of any customer except in accordance with the requirements of sections 4, 5, 6, or 7 of this title or section 604(3) (A) or (C) of the Fair Credit Reporting Act (Public Law 91–508, title VI, October 26, 1970, 84 Stat. 1136).

(b) This section shall not preclude a financial institution, communication common carrier, credit card issuer, or consumer reporting agency or any officer, employee, or agent thereof from notifying appropriate officials of suspected violations of the law: *Provided, however,* That any access to customer records shall be governed by sections 2 and 3 (a) of this title.

CUSTOMER AUTHORIZATION

SEC. 4. (a) A customer may authorize disclosure under section (2) (a) (1) if he or those seeking disclosure furnish to the financial institution, communication common carrier, credit card issuer, or consumer reporting agency a signed and dated statement by which the customer—

(1) authorizes in writing such disclosure in accordance with this section, which authorization shall not exceed a period of one year:

(2) describes with reasonable certainty the financial, toll or credit records which are authorized to be disclosed;

(3) specifies the agencies or authorities to which such records may be disclosed;

(4) states that he understands that he has the right at any time to revoke the authorization; and

(5) states that he understands that he has the right at any time to obtain from the financial institution, communication common carrier, credit card issuer, or consumer reporting agency a copy of the record of examinations.

(b) No such authorization shall be required as a condition of doing business with such financial institution, communication common carrier, credit card issuer, or consumer reporting agency.

(c) The financial institution, communication common carrier, credit card issuer, and consumer reporting agency shall keep a record of all examinations of the customer's records made pursuant to this section, including the identity of the person examining toll or credit records, the governmental agency or department which he represents, and a copy of the authorization.

ADMINISTRATIVE SUBPOENAS AND SUMMONSES

SEC. 5. An officer, employee, or agent of the United States, or any department or agency thereof, in accordance with section 2 (a) (2) and as authorized by law, may obtain from a financial institution, communication common carrier, credit card issuer, or consumer reporting agency copies of, access to, or information contained in the financial, toll, or credit records of any customer pursuant to an administrative subpoena or summons issued by the agency or department if—

(1) such subpoena or summons is sought in order to obtain information relevant to a legitimate law enforcement purpose; and

(2) a copy of the subpoena or summons has been personally received by the customer or mailed to his last known address by registered or certified mail on the date on which the subpoena was served on the financial institution, communication common carrier, credit card issuer, or consumer reporting agency together with the following notice:

"Records or information concerning your transactions held by the organization named in the attached summons are being sought by this (agency or department) for the following purpose: . If you desire that such records or information not be made

available, you should immediately notify this agency or department (self-addressed and postage paid envelope enclosed) in writing, signed, and dated. Otherwise, upon the expiration of eighteen days from the date of delivery or mailing of this notice, the records or information requested therein will be made available.";

(3) eighteen days have expired from the date of personal delivery or mailing of notice to the customer and within which time period neither the customer nor the financial institution, communication common carrier, credit card issuer, or consumer reporting agency has objected, in writing, to the record or information being made available; and

(4) concurrent with service of an administrative subpoena or summons a notice is provided to the financial institution, communication common carrier, credit card issuer, or consumer reporting agency stating the rights, obligations, and liabilities of such organization under this Act.

SEARCH WARRANTS

SEC. 6. An officer, employee, or agent of the United States or of any agency or department thereof, may obtain the financial, toll, or credit records of any customer, from a financial institution, communication common carrier, credit card issuer, or consumer reporting agency under section

2(a)(3), if he obtains a search warrant pursuant to the Federal Rules of Criminal Procedure.

JUDICIAL SUBPOENAS

SEC. 7. (a) An officer, employee, agent, or authority of the United States or any agency or department thereof in accordance with section 2(a)(4), may obtain from a financial institution, communication common carrier, credit card issuer, or consumer reporting agency copies of, access to, or information contained in, the financial, toll, or credit records of any customer pursuant to a judicial subpoena if—

(1) such subpoena is authorized by law and there is reason to believe that the subpoena will produce information relevant to a legitimate law enforcement purpose;

(2) a copy of the subpoena has been personally received by the customer or mailed to his last known address by registered or certified mail on the date on which the subpoena was served on the financial institution, communication common carrier, credit card issuer, or consumer reporting agency together with the following notice:

"Records or information concerning your transactions which are held by the organization named in the attached subpoena are being sought by this (agency or department or authority) for the following purpose:

. If you desire that such records or information not be produced, you should within eighteen days apply to the court named in the subpoena to prohibit its enforcement. Otherwise, upon the expiration of eighteen days from the date of the delivery or mailing of this notice the records or information requested therein will be made available."; and

(3) eighteen days have expired from the date of personal delivery or mailing of notice to the customer within which period either the customer or the financial institution, communication common carrier, credit card issuer, or consumer reporting agency or both may move to quash such subpoena in the court named in the subpoena; and

(4) concurrent with service of a subpoena a notice is provided to the financial institution, communication common carrier, credit card issuer, or consumer reporting agency stating the rights, obligations, and liabilities of such organization under this Act.

(b) Upon application of an officer, employee, agent or authority of the United States, the court may grant such subpoena in accordance with subsection (a) (1) with a temporary delay of delivery or of mailing to the customer a copy of the subpoena and any notification of the existence of the

subpoena, which delay shall not exceed ninety days following the date of issuance, if the court finds, on the basis of an affidavit or sworn testimony, that it has been affirmatively demonstrated that such notification would seriously jeopardize a continuing investigation of any of the criminal offenses listed in subsection (c). If the court so finds it shall enter an ex parte order granting the requested delay. Additional delays may be granted by the court upon application, but only in accordance with this subsection. The total period of time from service of the subpoena to notification of the customer shall not exceed one year, except if a judge of the Court of Appeals for the appropriate circuit finds on the basis of an affidavit or sworn testimony that there is probable cause to believe that a criminal offense listed in subsection (c) is being committed, has been committed, or is about to be committed, and that the records sought or made available pursuant to this Act are relevant to a continuing investigation of such offense; in which case such judge shall enter an ex parte order granting the requested delay. Such additional delays are not limited in number, but shall not exceed one hundred and eighty days each. Upon the expiration of the period of delay of notification of the customer the following notice shall be delivered or mailed to him along with a copy of the subpoena:

"Records or information concerning your transactions

which are held by the organization named in the enclosed subpoena were supplied to the authority named in the subpoena on (date) . Notification was withheld pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning .".

(c) Delay of notification of issuance of a subpoena may be sought pursuant to subsection (b) if such subpoena is issued in regard to any of the following offenses: Title 18, United States Code, section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsections (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnaping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of

stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping and assault), appendix, section 1202 (receipt, possession, or transportation of firearms); any offense punishable by imprisonment for more than one year under sections 2274 through 2277 of title 42, United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under title 18, United States Code, chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots); a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnaping, robbery, or extortion, and which is punishable under title 18, United States Code; any offense involving counterfeiting punishable under title 18, United States Code, sections 471, 472, or 473; any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States; any offense including extortionate credit transactions under title 18, United States Code, sections 892, 893, or 894; or any conspiracy to commit any of the foregoing offenses.

(d) Within thirty days after the expiration of a delay (or each extension thereof) granted under subsection (b), the judge granting or denying the delay shall report to the Administrative Office of United States Courts—

(1) the fact that a delay or extension of delay was requested;

(2) the offense the investigation of which was the basis for the request for delay;

(3) the disposition of the request for delay;

(4) the total period of time for which notice had been previously withheld; and

(5) the identity of the investigative or law enforcement officer, authority or agency requesting the delay.

In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for extension of delay and the number of extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office pursuant to this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by this section.

STATUTES OF LIMITATIONS

SEC. 8. Whenever a customer or other party has moved to quash a subpoena issued pursuant to sections (5) or (7), the running of the statutes of limitations for the offenses under investigation shall be suspended with respect to such customer or other party until the disposition of the motion by the court.

ACCESS

SEC. 9. Copies of, or the information contained in, financial, toll, or credit records obtained pursuant to this Act shall not be used or retained in any form for any purpose other than the specific statutory purpose for which the information was originally obtained, nor shall such information or records be provided to any other Government department or agency or other person except where the transfer of such information is specifically authorized by statute.

EXCEPTIONS

SEC. 10. (a) Nothing in this title prohibits the dissemination of any financial, toll, or credit information which is not identified with or identifiable as being derived from the financial, toll, or credit records of a particular customer.

(b) Subject to the limitations of section 9, nothing in this title prohibits examination by or disclosure of records to any supervisory agency solely in the exercise of its super-

visory function or the making of reports or returns required under the Internal Revenue Code of 1954.

JURISDICTION

SEC. 11. A civil action to enforce any provision of this title may be brought in any appropriate United States district court without regard to the amount in controversy within three years of the date of discovery of such violation by the aggrieved customer.

CIVIL REMEDIES

SEC. 12. DAMAGES.—(a) Any person, financial institution, communication common carrier, credit card issuer, consumer reporting agency, or any officer, employee, or agent of a financial institution, communication common carrier, credit card issuer, consumer reporting agency, or of the United States Government or any agency or department thereof who knowingly obtains or discloses one or more financial, toll, or credit records in violation of this title is liable to the customer or other party to whom such records relate for—

(1) any actual damages sustained by the customer as a result of the disclosure,

(2) such punitive damages as the court may allow, where the violation is found to have been willful, and

(3) in the case of any successful action to enforce

liability under this section, the cost of the action together with reasonable attorney's fees as determined by the court.

(b) INJUNCTIVE RELIEF.—In addition to any other remedy contained in this section or otherwise available, injunctive relief shall be available to any person aggrieved by a violation or threatened violation of this Act. In the event of any successful action, costs together with reasonable attorney's fees as determined by the court may be recovered.

TITLE II—MAIL COVERS

DEFINITION

SECTION 1. A mail cover is the procedure initiated at the request of a law enforcement authority by which a systematic record or inspection is made of any data appearing on the outside cover of any mail matter, including, but not limited to, the name and address of the sender, the place and date of postmarking, and the class of mail.

WHEN PERMITTED

SEC. 2. No mail cover shall be initiated—

(a) without the written authorization of the chief postal inspector, a regional chief postal inspector, or an inspector in charge of the United States Postal Service, except that if requested by the United States Attorney General the chief postal inspector shall authorize a mail cover pursuant to the requirements of this section; and

(b) unless the chief postal inspector, a regional chief postal inspector, an inspector in charge, or the United States Attorney General has good cause to believe, on the basis of an affidavit setting forth the specific reasons for the proposed mail cover and the facts on which the applicant relies, that such procedure is necessary in regard to a continuing investigation of the commission or attempted commission of a felony or is necessary to secure information in the interest of locating a fugitive; and

(c) unless the chief postal inspector, a regional chief postal inspector, or an inspector in charge has received a written request for such mail cover from the director or chief officer of an authority of a Federal, State, or local government one of whose primary functions is to investigate the commission or attempted commission of a felony, or unless the chief postal inspector, a regional chief postal inspector, or an inspector in charge has good cause to believe that the initiation of such mail cover is necessary to the investigation of the commission or attempted commission of a postal felony.

TIME PERIODS

SEC. 3. A mail cover may be conducted for a period of thirty days. Authorization for continuance of a mail cover

for additional periods of thirty days may be obtained, but only in accordance with this title. In no event shall the total period of time for a mail cover exceed one year, unless a judge of a United States court finds on the basis of an affidavit or sworn testimony that the termination of such mail cover would seriously jeopardize a continuing investigation of the commission or attempted commission of a felony or of the location of a fugitive. If such judge so finds he may authorize the continuance of the mail cover for additional periods not exceeding one year each. In such event, the requesting authority shall make application for continuance of the mail cover for periods not exceeding thirty days pursuant to section 2.

EMERGENCY AUTHORIZATION

SEC. 4. If the chief postal inspector or a regional chief postal inspector has good cause to believe that a speedy initiation of a mail cover is necessary in regard to a continuing investigation of the commission or attempted commission of a felony, or of the location of a fugitive he may authorize such mail cover on the basis of an oral request from the director or chief officer of an authority of a Federal, State, or local government one of whose primary functions is to investigate the commission or attempted commission of a felony: *Provided,*

That such oral request is followed within forty-

eight hours by a written request and supporting affidavit to the chief postal inspector or regional chief postal inspector who authorized the mail cover, and

That no record of any data received from such mail cover shall be made available to the requesting authority until such written request and supporting affidavit have been received and such mail cover has been approved pursuant to the requirements of section 2.

NOTICE

SEC. 5. Within a reasonable time, but not later than ninety days after the termination of the period for a mail cover, the chief postal inspector, regional chief postal inspector, or inspector in charge who authorized the mail cover, shall provide to the person whose mail is the subject of the mail cover a notice of the existence, dates, and purpose of such mail cover, except that such notice shall be waived if a judge of a United States court finds on the basis of an affidavit or sworn testimony that the notice of such mail cover would seriously jeopardize a continuing investigation of the commission or attempted commission of a felony or of the location of a fugitive.

RECORDS

SEC. 6. (a) All requests for mail covers, with records of action thereon, shall be within the custody of the chief postal inspector.

(b) The regional chief postal inspectors and the inspectors in charge shall submit a copy of each mail cover request received together with a report of any action thereon to the chief postal inspector.

(c) If the chief postal inspector determines that a mail cover was improperly initiated by a regional chief postal inspector or an inspector in charge, all data and records of information received from such mail cover shall be impounded and the requesting authority notified of the discontinuance of the mail cover and the reasons therefor.

(d) No file or record pertaining to a mail cover shall be retained for a period in excess of eight years.

REPORTING REQUIREMENT

SEC. 7. In April of each year the chief postal inspector shall transmit to the Congress a full and complete report for the immediately preceding year of—

(a) the number of requests for mail covers and the number of authorizations granted listed by each Postal Inspection Service division for which such authorizations were made;

(b) the identity of the law enforcement agencies making requests for mail covers listed by each Postal Inspection Service division for which such requests were made; and

(c) a list of the offenses for which mail cover re-

quests were received listed by each Postal Inspection Service division for which such requests were made.

INJUNCTIVE RELIEF

SEC. 8. In addition to any other remedy contained in this title or otherwise available, injunctive relief shall be available to any person aggrieved by a violation or threatened violation of this title. In the event of any successful action, costs together with reasonable attorney's fees as determined by the court may be recovered.

TITLE III—AMENDMENTS TO CHAPTER 119, TITLE 18, UNITED STATES CODE

COMMUNICATION COMMON CARRIER PRACTICES

SECTION 1. (a) Section 2510 of title 18, United States Code, is amended by adding the following new definitions:

"(12) 'supervisory observing' means the interception by an officer, employee, or agent of a communication common carrier of any oral or wire communication of an officer, employee, or agent of such communication common carrier;

"(13) 'service observing' means any interception which is a necessary incident to the rendition of service, by a communication common carrier, of the voice content of a customer-to-customer oral or wire communication for purposes other than supervisory observing or protection against theft of service; and

"(14) 'protection against theft of service' means any action on the part of a communication common carrier the purpose of which is to protect such communication common carrier against a violation of section 1343 of title 18, United States Code (fraud by wire, radio, or television) or similar State statute.".

(b) Section 2511 (2) (a) (i) of such title 18 is amended to read: "It shall not be unlawful for an officer, employee, or agent of a communication common carrier, acting in the official capacity of his employment, to engage in—

"(A) supervisory observing: *Provided*, That—

"(1) the officer, employee, or agent against whom such interception is directed has been given prior notice in writing of the likelihood of such interception,

"(2) such interception is engaged in solely for the purposes of training or evaluation of employee performance,

"(3) such interception is engaged in solely on communication facilities which are clearly identified as being subject to possible interception, and

"(4) such interception involves no recording of the voice content of any communication;

"(B) service observing: *Provided*, That—

"(1) the interception of the voice content of

any customer-to-customer oral or wire communication shall not exceed ten seconds without the imposition of an intercept announcement signal or other actual notice to the customer, and

"(2) such interception involves no recording of the voice content of any communication;

"(C) interception of any oral or wire communication for purposes of protection against theft of service: *Provided*, That—

"(1) such communication common carrier shall not intercept or record more than one hundred and twenty seconds of the voice content of any oral or wire communication intercepted in the interest of protection against theft of service.".

SUPERVISORY OBSERVING BY OTHER THAN COMMUNICATION COMMON CARRIERS

SEC. 2. Section 2516(2) (d) is amended by adding at the end thereof the following:

"*Provided*, That no interception of any wire or oral communication by a person directed against an employee which is authorized by prior consent of such employee, shall be lawful under this chapter unless:

"(i) such employee against whom such interception is directed has been given prior notice in writing of the likelihood of such interception, and

"(ii) such interception is engaged in solely for the purpose of training or evaluation of employee performance, and

"(iii) such interception is engaged in solely on communication facilities which are clearly identified as being subject to possible interception, and

"(iv) such interception involves no recording on tape or wire or other comparable device of the voice content of any communication.".

COURT ORDERED INTERCEPTIONS IN TOLL FRAUD CASES

SEC. 2. Section 2516(I)(c) of such title 18 is amended by deleting the semicolon and adding at the end thereof the following: ", section 1343 (fraud by wire, radio, or television) :".

REPORTING REQUIREMENTS

SEC. 3. Section 2519 of such title 18 is amended by adding at the end thereof the following new subsection:

"(4) in January of each year, each communication common carrier shall report to the Federal Communications Commission concerning the interceptions made by it during the preceding calendar year for the protection of its service against theft of service, including a description of all such interceptions, the nature and frequency of the incriminating communications intercepted, the number of persons whose communications were intercepted,

the total number of hours of recording of communications intercepted, and the average minutes of such recording for each communication intercepted. In April of each year the Chairman of the Federal Communications Commission shall transmit to Congress a full and complete report of the information received by the Commission pursuant to this subsection.".

POSSESSION OF DEVICE FOR THEFT OF SERVICE

SEC. 4. Sections 2512 and 2513 of such title 18 are amended to read as follows:

"§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices or devices for theft of service prohibited

"(1) Except as otherwise provided in this chapter, any person who willfully—

"(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious intereeption of wire or oral communications or the surreptitious theft of a communication common carrier's service;

"(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing

or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications or the surreptitious theft of a communication common carrier's service, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications or the surreptitious theft of a communication common carrier's service; or

"(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications or the surreptitious theft of a communication common carrier's service,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

"(2) It shall not be unlawful under this section for—

"(a) a common carrier or an officer agent, or employee of, or a person under contract with, a common carrier, in the normal course of the common carrier's business, or

"(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State or a political subdivision thereof, to:

Send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications or the surreptitious theft of a communication common carrier's service.

"§ 2513. Confiscation of wire or oral communications intercepting devices or devices for theft of service

"Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All

provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices or devices for the surreptitious theft of a communications common carrier's service under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.".

DEFINITION OF ORAL OR WIRE COMMUNICATION

SEC. 5. Section 2510(4) of such title 18 is amended by deleting "aural".

TITLE IV—PENALTIES

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof willfully violates any provision of title I or II of this Act shall be fined not more than $1,000 or imprisoned not more than one year, or both.

TITLE V—CONGRESSIONAL SUBPOENAS

Nothing in this Act shall apply to subpoenas issued by the United States Congress.

TESTIMONY OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER PAULEY, DEPUTY CHIEF, LEGISLATION AND SPECIAL PROJECT SECTION

Mr. HEYMANN. Thank you very much, Mr. Chairman.

I have been looking forward to coming over to the House of Representatives and I look forward to getting to know you gentlemen.

If my complete prepared statement can be put in the record, Mr. Chairman, I can shorten it a little as I go through it, which might be more convenient in allowing more questions and answers.

Mr. KASTENMEIER. That will be fine. Without objection your statement in its entirety will be accepted and made a part of the record.

[The statement follows:]

STATEMENT OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. Chairman and members of the subcommittee, I am pleased to be here today to present the views of the Department of Justice on H.R. 214, the Bill of Rights Procedures Act. Title I of this bill, which will be the principal focus of my testimony, would create a legally protectible privacy interest of an individual in the records of a third-party-held record keeper that pertain to such an individual, and would generally bar access by the government to the records unless the individual had been notified and afforded an opportunity to challenge the government's right to such access in court.

As you know, Mr. Chairman, the question of the privacy rights of individuals, with respect to records of their transactions in the possession of third parties, has been and continues to be a matter of considerable controversy, because of the vital role that such records play in law enforcement. This Subcommittee is to be commended for its pioneering effort in the 94th Congress to develop workable legislation in this area in the wake of the Supreme Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976), holding that the Fourth Amendment provides no protection to the subject of bank records owned and possessed by financial institutions. In 1976, when this Department last communicated its views to this Subcommittee, it took the position that legislation like title I of H.R. 214 was fundamentally misguided and unacceptable. Its view then as that such legislation was inherently inconsistent with important needs of law enforcement for ready access to financial records; and it saw no way then by which such legislation could be fashioned so as to reconcile the dual interests of customer privacy and legitimate law enforcement.

During the present session of the 95th Congress, we in the Justice Department have reexamined this issue and, as the Chairman is aware, have changed our former position. We now favor legislation incorporating the basic principles of title I of H.R. 214, provided that certain significant amendments are made to better accommodate the needs of law enforcement. In short, we believe that personal privacy and effective law enforcement need not be inconsistent. We continue, of course, to be vitally concerned about the extent of crime in this country, particularly organized crime, white collar crime, narcotics trafficking and public corruption—the areas over which the federal government has the primary enforcement role and to which the Department of Justice attaches the highest priority. We have the responsibility of assuring Americans that we are doing all we can to provide effective law enforcement in these areas. And to fulfill that responsibility, it is imperative that our legitimate access to third-party-held records is not denied or unduly delayed. At the same time, we are sensitive to the erosion of personal privacy that has resulted from advances in technology and changes in modern society. Like many others we have concluded that some additional safeguards are necessary to insure that American citizens' privacy is not forfeited as a condition to enjoying fully the benefits available in our society.

As part of this policy review, the Justice Department has testified on a number of bills very similar to title I of H.R. 214 (e.g., S. 2096; title XI of H.R. 13088).

In the course of presenting such testimony we have also offered a draft piece of legislation which incorporates all of our recommendations—those reflecting major policy issues as well as more minor policy questions, structure and drafting suggestions. I would like to make a copy of our proposed statutory text, which is suggestive of some of our comments on H.R. 214, available to this subcommittee.

Our proposal endorses the core principle of title I of H.R. 214 that, in general, an individual should be granted a statutory right of privacy in certain kinds of records pertaining to him or her, held by third-party record keepers, and, subject to appropriate exceptions, should be given fair notice that the government is seeking access to those records and an opportunity (i.e. "standing") to object in court to such access before the information is disclosed to the government.

PROTECTION OF INDIVIDUALS

As a guiding principle, we believe that the provisions of this legislation should apply no more broadly than necessary to achieve the desired result. Consequently, it is our position that the newly created rights and the accompanying procedures should apply only to individual, natural persons and not, as set forth in H.R. 214, to corporations and other legal entities.

The underlying rationale of this legislation is to protect personal privacy. In our view, such protection attaches appropriately only to human beings. See e.g., *Bellis* v. *United States*, 417 U.S. 85 (1974) which held that a partnership may not assert Fifth Amendment rights with respect to partnership records. The availability or non-availability of the provisions of this legislation, like the availability or non-availability of limited liability, should be just one more consideration that goes into an individual's decision to create a legal entity in which to conduct his or her business. It is significant that other statutes seeking to afford privacy protection such as the Privacy Act of 1974, are limited to the records of natural persons. 5 U.S.C. 552 et seq. This distinction should be incorporated in this legislation as well.

KINDS OF RECORDS COVERED

The proposal that we wrote in response to other legislation covers the records of all types of depository institutions organized under the laws of, or with their principal place of business located in, the United States or any State.

Contrary to H.R. 214, however, our proposal does not extend to telephone toll records. Although we have not yet reached a final judgment as to whether any or what sort of additional protection is needed for telephone toll records, our general view is that only a small class of personal records should be covered by new legislation. While there is information, such as that contained in financial records, in which an individual should have a legitimate expectation of privacy, there is other data in which such an expectation is unwarranted. Scrutiny of financial records, for example, can reveal a profile of a person's entire life, including intimate information about his most cherished beliefs, habits and causes. Other records are not as revealing.

ACCESS THROUGH PROCESS

A central provision of H.R. 214 is its requirement that the government use legal process to obtain access to an individual's records. By so requiring, the legislation prohibits "Informal access" to records by government agencies. But such a scheme takes no account of the fact that there are agencies with a legitimate need for continued access to such records, which do not have sufficient forms of process available and which have always relied on informal access (i.e. where an investigator simply requests a record keeper to cooperate). In the Department of Justice, for example, only the Antitrust Division and the Drug Enforcement Administration have any form of administrative summons power, and this power is limited to certain types of cases.

If the requirement of process is enacted unchanged, the gap that is created might make many kinds of necessary, lawful investigations impossible or force greater and earlier use of grand jury procedures to obtain third-party-held records. Neither alternative is satisfactory. Additionally, the grand jury is not available where an agency is conducting civil law enforcement. To avoid these results, either supplementary administrative summons power should be conferred upon agencies which do not have it or some new procedure should be created. We propose the latter: a new procedure.

We recommend, in effect, formalizing informal access by requiring that a formal written request be used by agencies which have no administrative summons power to obtain access to financial records. Such a written request (which would have to conform to regulations promulgated by the head of each agency and department) would be subject to the notice and challenge provisions of the legislation just like any summons or subpoena. Unlike a summons or subpoena, however, in the event of an unsuccessful challenge (or none being filed), the record keeper would be free to disclose the records but would not be compelled to do so.

Our support for such a procedure is based on our belief that record keepers, which would now have rules to govern the release of records and which would not be held liable for their good faith reliance on government representations, should and will cooperate with our legitimate investigations.

NOTICE

With regard to the notice provisions of this legislation, there are two exceptions to the pre-notification scheme that we believe are crucial.

First, some provision must be made to deal with emergency situations in which immediate access to an individual's records is needed to avoid imminent danger of physical injury, serious property damage, or flight from prosecution. In a kidnapping case, for example, obviously every second counts. It might turn out that a key clue can be found in third-party-held records. In this situation, the delay that would occur from having to give notice or even from having to find a judge to sanction dispensing with notice could seriously threaten a victim's life. We suggest, therefore, that in emergency cases, the government be able to obtain the needed records upon a written representation to the record keeper that one or more of the above conditions is present. Subsequently, within a short time, the government would have to submit to a court a sworn statement justifying resort to the emergency access procedure. Thereafter, the customer would receive notice, the right to challenge and other remedies as provided for in the other provisions of the legislation.

Second, there are non-emergency situations where the harm that is feared will not result from the delay caused by having to give notice, but from the notice itself. In these cases, an opportunity must be afforded the government to secure a court order dispensing with the pre-notice requirements of the legislation and forbidding the record keeper from alerting an individual that the government has sought or received records.

Unlike the provision in H.R. 214, which allows such a delay of notice only for requests made through judicial subpoenas and only when the government has "affirmatively demonstrated" that notice "would seriously jeopardize a continuing investigation" of certain enumerated offenses, the delay provision should be applicable to all offenses and to all avenues of access to records where the court finds there is reason to believe that giving notice would (1) endanger life or physical safety, (2) cause flight from prosecution, (3) cause the destruction of evidence, (4) result in witness intimidation or (5) otherwise jeopardize an investigation or official proceeding or unduly delay a trial or ongoing official proceeding.

CUSTOMER CHALLENGE

Another set of our proposals seeks to modify the customer challenge provisions of the legislation.

Because there is a need for speedy access to third-party-held records in many investigations, the period for a customer to bring a challenge should be kept relatively short. The 18 days provided for by H.R. 214 should be substantially reduced to insure that delays are kept to a minimum.

Furthermore, challenges should be heard not only by district court judges, but also by federal magistrates. Giving magistrates such expanded jurisdiction can divert these disputes from overburdened district judges.

Another procedure we recommend to minimize delays in this process is to require a court, to which a challenge has been made, to decide the case within a prescribed period of time. Since the issues to be decided in these challenge suits should be relatively simple, this should not be too burdensome to implement.

One further major change we are suggesting in this legislation is to give the customer more of the burden of going forward to stop the government from obtaining his or her financial records. Except in the case of a judicial subpoena, H.R. 214, following the model of other statutes like the Tax Reform Act of 1976,

permits a customer to halt government attempts to gain access to records merely by sending a written objection to the government agency or financial institution. Experience to date under the Tax Reform Act suggests that this makes objections too easy and encourages frivolous interference with wholly legitimate investigations. Consequently, instead of allowing the customer to block a request by merely filing an objection with the record-keeper, we propose a provision requiring the customer to file a motion in court. With such a requirement, frivolous challenges can better be avoided. It is important to note, however, that once the customer makes an initial showing that access may be improper, the government bears the burden of proving to the court that the records are sought for a legitimate law enforcement purpose.

Similarly, we believe it essential that this legislation include a provision which prohibits a customer from taking an immediate appeal from an unsuccessful challenge to the government's request for records. Such appeals should be joined with claims arising from any proceedings initiated by the government or wait a period of time for the government to state that no such proceedings are contemplated. By this means, delays in carrying out legitimate investigations will be minimized.

We also want to make certain that the standard of relevance the government must meet in order to prevail in a customer challenge suit is not unreasonable. If too high a standard is imposed, many legitimate investigations will founder. Consequently, the test for allowing the government to obtain records should be whether or not those records may be relevant to a legitimate law enforcement purpose. While not worded exactly this way, H.R. 214 seems to incorporate such a realistic standard.

We have included in our proposal a requirement that record keepers, which receive requests for records, process such requests during the notice period and be prepared to deliver the records requested to the government at the end of the period for filing challenges or after an unsuccessful challenge has been made. This provision can help diminish the adverse impact this legislation would have on law enforcement activities without requiring any sacrifice in the way of privacy protection.

Along the same lines, we suggest a provision which tolls any applicable statute of limitations for the period in which customer challenges are taken. Without such a requirement, a customer might seek to avoid prosecution by trying to circumvent applicable statutes of limitations.

Finally, we would like to see a provision added to the challenge procedures which would allow the government to request an in camera inspection of any showing it is required to make. Without this procedure, there would be a temptation to bring challenges not to protect privacy but to conduct criminal discovery.

USE OF INFORMATION

We suggest that the bill recognize that information which the government lawfully possesses may have legitimate uses apart from the purposes for which it was originally obtained.

H.R. 214, on the other hand, prohibits use of records "for any purpose other than the specific statutory purpose for which the information was originally obtained." This conflicts with the well-established constitutional and legal principle that evidence legally obtained for one purpose may be used for other legitimate law enforcement purposes. E.g., *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464–473 (1971); Rule 6(e). F. R. Crim. P. The principle is of particular importance at the incipient stages of a criminal investigation, where all participants and offenses may not be known. For example, the S.E.C. could subpoena bank records for the purpose of investigating violations of the federal securities laws and upon analysis discover that the records do not reveal securities violations but do reveal blatant violations of the tax laws. It would be unreasonable and excessively burdensome for another government agency to have to resupoena the records for tax law purposes and notify the subjects that it now seeks to use the records to investigate tax violations.

This provision would, in effect, amend the Privacy Act of 1974 in a piece-meal fashion. Different rules might apply to financial records than to medical, educational or other personal information.

Such different rules would pose an extraordinary administrative burden, but—even more important—this sort of piecemeal policy making is inadvisable for a complicated, important subject like the transferring of records among government agencies. This subject should be considered as a whole, with an eye toward

a uniform, coherent policy, and should be fully deliberated by the relevant committee or committees of the Congress.

In our view, third-party-held records should be subject to the same rules of use, retention, and disclosure (i.e., the Privacy Act of 1974) as other records legitimately in the hands of the government. Consequently, supervisory agencies (as defined in H.R. 214 and our bill) should be entitled to exchange customer information with other supervisory agencies for proper purposes and should be authorized to report to law enforcement agencies possible violations of law from records obtained pursuant to the procedures of this legislation. Moreover, nothing in the legislation should prohibit a record keeper from reporting suspected violations of law to the appropriate government authority.

PENALTIES

To insure that the provisions of this legislation are obeyed, effective penalties are necessary. Therefore, we support the availability of civil sanctions (including liquidated damages, punitive damages, and attorneys fees where appropriate) to a customer against the government, a financial institution, or the agents of either in order to remedy violations that occur. But because this legislation imposes so many radically new procedures, we believe it is preferable that there should be no criminal penalties, at least in the first few years of the bill's implementation. Such penalties might have a serious freezing effect on recordkeepers' practices and, given the availability of effective civil remedies, are probably not necessary.

In addition, it is desirable that the bill include a provision which specifies that financial institutions will not be liable for their good faith reliance on written government representations. Here, too, the goal is to minimize the chilling effect that such new legislation is bound to have.

COVERAGE OF GOVERNMENT AUTHORITIES

H.R. 214 does not, as currently written, apply its protections to state and local authorities or to Congressional access to records. In order to provide uniform rules regulating government access and to give meaningful protection to the right of privacy created by the legislation, our proposal includes these other authorities. We believe that whenever an arm of the government obtains personal records, the same philosophical basis for protecting privacy logically applies. Accordingly, we believe that the same procedural right should be granted to customers whose records are sought by state and local law enforcement authorities and by the Congress.

EXEMPTIONS

Let me now turn to the subject of exemptions—those areas to which, in our judgment, the provisions of this privacy legislation should not apply. These areas, by and large, are ones where unimpeded access to financial records is so important that no change in existing procedures should occur.

First, we believe very strongly that the provision of privacy legislation should not apply to the federal grand jury process.

The federal grand jury is the constitutionally prescribed mechanism, in the federal criminal justice system, for investigating and bringing felony charges. So critical is it to safeguard this process from litigious interruption and crippling delays that the Supreme Court has repeatedly held that the grand jury process should not be hampered with minitrials, evidentiary hearings and other cumbersome procedures. For example, it is settled law that even the victim of an allegedly unconstitutional search and seizure under the Fourth Amendment, who certainly would have standing at trial to challenge the introduction of the seized evidence, nevertheless may not be heard to protest its introduction and use before the grand jury. *United States* v. *Calandra*, 414 U.S. 338 (1974). Since the statutory rights to pre-notification and standing that would be created by any statute in this area cannot purport to rest on any greater privacy footing than a claim of an unconstitutional search and seizure, (compare *United States* v. *Miller*, 425 U.S. 435 (1976), it would be anomalous and would lead to inconsistent results if federal grand juries were subject to the requirements of any new law.

In addition to the unique legal and constitutional posltion which the federal grand jury occupies, it is protected by rules seeking to insure the secrecy of its proceedings. Expanded notice and challenge rights in the grand jury context could seriously jeopardize its traditional secrecy and, in so doing, pose an unintended threat to the privacy rights of individuals being investigated. Furthermore, federal grand jury subpoenas are not issued randomly and are already subject to the supervisory authority of district courts which can wield their contempt and remedial powers to deter or punish any abuse.

Finally, the legislation in this area represents an experimental procedure with uncertain impact on legitimate law enforcement activities. It is appropriate to confine the initial application of these provisions to those avenues of legal process utilized in law enforcement which are not as integral to criminal procedure or as constitutionally rooted as the grand jury. After an initial period in which the provisions of this legislation can be studied, modifications, if needed, can be made. We note that, presumably for the foregoing reasons, grand juries are exempted from a similar Senate bill, S. 2096.

A second exemption we advocate is when access to records is sought for the purpose of conducting foreign counter—or foreign positive—intelligence activities or when access is sought by the Secret Service for the purpose of carrying out its protective functions.

In such cases even notice after the fact could gravely impair those functions. In the relatively infrequent occasions when records are requested for these purposes, the government agency, allowed to conduct such activities, should be able to gain access to records by presenting to the recordkeeper a certification that the exempt purposes are present. The recordkeeper should then be prohibited from notifying the customer of the request for or disclosure of records.

Third, since the purpose of the proposed legislation is to protect individual privacy, the provisions of any bill should not apply when records are sought by the government in connection with an investigation or proceeding, such as a civil rights "redlining" investigation, directed at the recordkeeper institution itself. In these cases, whatever privacy right an individual might have is far outweighed by the enormous costs and other burdens of having to give hundreds of thousands of individuals notice and standing. Where the recordkeeper is the subject of an investigation, abuses may be avoided by requiring the government to submit a sworn statement that records are being inspected for that purpose and by prohibiting the government from using such records against any individual customer without following the notice and challenge provisions of this legislation.

While there are other modifications and provisions which we suggest, I have briefly reviewed the most important parts of our proposal. Although I realize that the provisions I have referred to are numerous and complex, this is an area which lends itself to complexity. There are, as this Subcommittee is sell aware, simply no easy answers here, no shortcuts to finding the appropriate accommodation of two concepts as important as privacy protection and effective law enforcement.

Mr. Chairman, the proposals that we are making are the result of a great deal of study and careful balancing of the interests involved. While we realize there may be other ways to accomplish the ends we propose, it is of paramount concern to this Department that any modification does not disrupt this balance in such a manner that effective law enforcement will be impaired.

We appreciate the hard work your Subcommittee has devoted to this subject and we hope to assist you in any way we can to avoid such a result and to assure the passage of a good privacy bill.

I shall comment briefly on the remaining titles of the bill.

TITLE II—MAIL COVERS

Title II of H.R. 214 is in many respects like 39 C.F.R. § 233.2, the postal regulation applicable to government mail covers. Summarized very briefly, Title II would permit mail covers to be maintained for certain periods of time when good cause exists to believe that such covers are necessary in investigating felony cases or in locating fugitives. Within no more than ninety days after the termination of any mail cover (absent special findings by a federal court), persons whose mail was subject to the covers would be notified thereof, and also of the dates involved and the purposes of the covers. The chief postal inspector would be required to make annual reports to the Congress, in detail, concerning mail covers. A Federal or State employee who initiated a mail cover contrary to law would be subject to civil suit for damages.

Under existing regulations the Postal Service exerts "rigid controls and supervision" over mail covers. 39 C.F.R. 233.2(a). Mail covers are authorized in the interest of national security, locating fugitives, and obtaining evidence of the commission or attempted commission of felonies. A request to the Postal Service by a law enforcement agency must stipulate and specify "reasonable grounds that exist which demonstrate the mail cover is necessary" to further one of the purposes for which a mail cover is authorized. 39 C.F.R. 233.2(d)(2)(ii). The regulation provides centralized control over mail covers; and, of course, the usual restrictions against breaking mail matter apply. 39 C.F.R. 233.2(f). There are a number of other provisions in the regulation that are comparable to provisions (not summarized above) of the proposed legislation.

Except for the omission in the bill of foreign intelligence and counter-intelligence investigations as a basis for mail covers—which we regard as a serious deficiency—the Department has no major objection to this title, which would essentially codify the standards set forth under the existing postal regulations. However, we point out that there are certain disadvantages which may arise as a consequence of codification of the regulation. It has been held that the exclusionary rule does not apply to bar the admission of evidence at trial when obtained through the use of a mail cover conducted in good faith but not entirely in keeping with the regulations. *United States* v. *Schwartz*, 176 F. Supp. 613 (E.D. Pa. 1959), *aff'd on other grounds*, 283 F. 2d 107 (3rd Cir., 1960), cert. denied, 364 U.S. 942 (1961); see also *United States* v. *Leonard*, 524 F. 2d 1976, 1088–1089 (2d Cir. 1975); *United States* v. *Beckley*, 335 F. 2d 86, 90 (6th Cir. 1964, cert. denied, 380 U.S. 922 (1965). The issue in general whether violation by an agency of its regulations should lead to suppression of evidence will apparently be decided by the Supreme Court in its next term. See *United States* v. *Caceres*, 545 F. 2d 1182 (9th Cir. 1976), cert. granted, June 5, 1978. The Postal Service may also have comments on Title II.

TITLE III—AMENDMENTS TO CHAPTER 119, TITLE 18, UNITED STATES CODE

There are four aspects to this title. First, the title would spell out the interception actions that a common carrier of communications could take in the interest of maintaining or improving service or in order to protect against theft of service. Second, the bill would amend 18 U.S.C. 2516(1)(c) to allow for applications for interception orders in cases involving possible violation of 18 U.S.C. 1343 (wire fraud). Third, the bill would amend 18 U.S.C. 2512 and 2513 to make those sections applicable to theft devices as well as to intercepting devices. Finally, the bill would drop the limiting adjective "aural" from the definition of "intercept" in 18 U.S.C. 2510(4).

Existing law limits the service observing and random monitoring practices of communication common carriers to mechanical or service quality control checks. 18 U.S.C. 2511(2)(a)(1). This provision would be replaced under the bill. In doing so, "supervisory observing" practices would be limited, in part, by a requirement that the carrier's employees be given prior notice of the likelihood of the interception, and that such interceptions be conducted only for training purposes or for the evaluation of employee performance.

Being most knowledgeable in this area, the communication common carrier should be required to justify the practices to be endorsed in legislation. At the same time, the employees subject to possible "supervisory observing" interceptions would seem to have such an interest in the matter as to make their assessments pertinent. Thus, we believe that a mutual agreement between employees and the carriers regarding the practices would represent the most apt authority for "supervisory observing" interceptions. See *Electronic Surveillance: Report of the Commission for Review of Federal and State Law Relating to Wiretapping and Electronic Surveillance*, 29, 119 (1976). Accordingly, we recommend that the bill authorize "supervisory observing" interceptions (as defined therein) to the extent such practices are permitted pursuant to agreement between the carriers and employees.

With regard to the second and third aspects of this title, the Department supports the inclusion in 18 U.S.C. 2516(1)(c) of offenses under 18 U.S.C. 1343, as well as the enlargement of 18 U.S.C. 2512 and 2513 to cover theft of services devices.

The final purpose of the title is to expand the scope of the wiretap statutes from the current prohibition covering only "aural acquisition" of "wire or oral" com-

municications, 18 U.S.C. 2510, 2511, by deleting the modifier "aural". Apparently, the purpose is to cover, among other things, interception of data transmissions by wire or microwave between computers. Given the enormous amounts of personal and business information that can be transmitted in this manner, the Department of Justice agrees that the need to protect personal privacy and the security of business transactions makes this change desirable. Accordingly, the Department of Justice supports expansion of Title III prohibitions to cover all forms of electronic information transmission.

We point out, however, that deletion of the word "aural," without more, might sweep beyond this desirable goal to criminalize conduct that should not be subject to penal sanctions. For example, if "aural" was delcted, the statutc would extend to the use of any kind of "device" (arguably even ordinary reading glasses) to examine toll records or trace telephone calls, forms of activity clearly not intended to be covered by these statutes. See S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). As a further example of potential overbreadth if "aural" alone were to be deleted, the statute might then proscribe the use of a mechanical filing system to retrieve information previously sent by wire. Since a violation of the wiretap statutcs carries serious consequences, including criminal penalties and a prohibition on use of the information in court or otherwise (see 18 U.S.C. 2511(1)(d), 2515), we are concerned that any expansion of these statutes be carefully considered and tailored to cover only those types of interception that pose a genuine threat to privacy comparable to the "aural acquisition" of the contents of wire or oral communications now covered by the law.

Accordingly, while favoring expansion of the wiretap statutes to encompass non-aural acquisitions of communications involving computers or transfers of symbolic or other information betwcen persons or information proccssing facilities, we rccommend that the Committee act to avoid the potential overbreadth problems discussed.

REMAINING TITLES (IV AND V)

Titles IV and V deal with the issucs of criminal penaltics and application of the bill to Congress. As previously noted, we differ with the judgments reflected therein that criminal penalties are appropriate for Title I violations, and with the exemption of Congress from the legislation.

TITLE XI—RIGHT TO FINANCIAL PRIVACY [1]

SEC. 1100. This title may be cited as the "Right to Financial Privacy Act of 1978".

DEFINITIONS

SEC. 1101. For the purpose of this title, the term—

(1) "financial institution" means any bank, savings bank, industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks) or credit union organized under the laws of, or having its principal place of business in, any State or the United States.

(2) "financial records" means any original or any copy of any record held by a financial institution, containing information pertaining to a customer's relationship with the financial institution, that individually identifies thc customer of that institution;

(3) "government authority" means the Congress of the United States, or any agency or department of the United States, or any State or any political subdivision of any State, or any officer, employee or agent of any of the foregoing;

(4) "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States;

(5) "person" means an individual only and does not include a partnership, corporation, association, trust, or any other form of legal entity;

(6) "customer" means a person who utilized or is utilizing any service of an office of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

[1] This proposal represents the combined views of the Departments of Justice and the Treasury.

(7) "supervisory agency" means, with respect to any particular financial institution, any one or more of the following which has statutory authority to examine or regulate such institution—

(A) the Federal Deposit Insurance Corporation;
(B) the Federal Savings and Loan Insurance Corporation;
(C) the Federal Home Loan Bank Board;
(D) the National Credit Union Administration;
(E) the Board of Governors of the Federal Reserve System;
(F) the Comptroller of the Currency;
(G) the Securities and Exchange Commission;
(H) any State banking or securities department or similar agency; or
(I) the Secretary of the Treasury, with respect to the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act (Public Law 91–508, Title I & II); and

(8) "law enforcement" includes administration or enforcement of any criminal, civil, or regulatory statute or any regulation, rule, or order issued pursuant thereto.

CONFIDENTIALITY OF RECORDS—GOVERNMENT AUTHORITIES

SEC. 1102. Except as provided by sections 1103, 1112, 1113, and 1115, no government authority may have access to or obtain copies of, or the information contained in, the financial records of any customer from a financial institution unless the financial records are reasonably described and—

(a) such customer has authorized such disclosure in accordance with section 1104;

(b) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 1105;

(c) such financial records are disclosed in response to a court order, other than a search warrant or federal grand jury subpoena, which meets the requirements of section 1106;

(d) such financial records are disclosed in response to a search warrant which meets the requirements of section 1107; or

(e) such financial records are disclosed in response to a formal written request from a government authority which meets the requirements of section 1108.

CONFIDENTIALITY OF RECORDS—FINANCIAL INSTITUTIONS

SEC. 1103. (a) No financial institution, or officer, employee or agent of a financial institution, may provide to any government authority access to, or the information contained in, the financial records of any customer except in accordance with the provisions of this title.

(b) Every financial institution shall, within one year after the enactment of this title and yearly thereafter, notify its current customers of their rights under this title.

(c) Nothing in this section shall preclude any financial institution, or any officer, employee or agent of a financial institution, from providing to a government authority information that such institution, or officer, employee or agent, believes may be relevant to a possible violation of any statute or regulation.

CUSTOMER AUTHORIZATION

SEC. 1104. (a) A customer may authorize disclosure under section 1102 (a) if he furnishes to the financial institution and to the government authority seeking to obtain such disclosure a signed and dated statement which—

(1) authorizes such disclosure for a period not in excess of three months;

(2) states that the customer may revoke such authorization at any time before the financial records are disclosed;

(3) identifies generally the financial records which are authorized to be disclosed; and

(4) specifies the government authority to which such records may be disclosed.

(b) No such authorization shall be required as a condition of doing business with such financial institution.

(c) The customer has the right, unless the government authority obtains a court order as provided in section 1109(b) and (c), to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a government authority pursuant to this section, including the identity of the government authority to which such disclosure is made.

ADMINISTRATIVE SUBPOENA AND SUMMONS

SEC. 1105. A government authority may obtain financial records under section 1102(b) pursuant to an administrative subpoena or summons otherwise authorized by law only if—

(a) such subpeona or summons is issued in order to obtain information which may be relevant to a legitimate law enforcement purpose; and

(b) The notice provisions of section 1109 and the customer challenge provisions of section 1110 have been complied with.

COURT ORDER OTHER THAN A SEARCH WARRANT OR A FEDERAL GRAND JURY SUBPOENA

SEC. 1106. A government authority may obtain financial records under section 1102(c) pursuant to a court order other than a search warrant or federal grand jury subpoena only if—

(a) such order is authorized by law and is issued in order to obtain information which may be relevant to a legitimate law enforcement purpose; and

(b) the notice provisions of section 1109 and the customer challenge provisions of section 1110 have been complied with.

SEARCH WARRANTS

SEC. 1107. A government authority may obtain financial records under section 1102(d) only if it obtains a search warrant pursuant to the Federal Rules of Criminal Procedure or applicable State law. The notice provisions of section 1109(d) shall apply.

FORMAL WRITTEN REQUEST

SEC. 1108. A government authority may obtain financial records under section 1102(e) pursuant to a formal written request only if—

(a) no administrative summons or subpoena authority reasonably appears to be available to that government authority to obtain financial records for the purpose for which such records are sought;

(b) the request is authorized by regulations promulgated by the head of the agency or department;

(c) the request is issued in order to obtain information which may be relevant to a legitimate law enforcement purpose; and

(d) the notice provisions of section 1109 and the customer challenge provisions of section 1110 have been complied with.

NOTICE PROVISIONS

SEC. 1109. (a) When access to financial records is sought pursuant to section 1102(b) (administrative subpoena or summons), 1102(c) (court order other than a search warrant or federal grand jury subpoena), or 1102(e) (formal written request) the government authority shall—

(1) serve upon the customer or mail by registered or certified mail to his last known address a copy of the process or request together with the following notice:

"Records concerning your transactions which are held by the financial institution named in the attached process or request are being sought by (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 U.S.C. for the following general purpose:

"If you desire to oppose the disclosure of the records, you must within seven (7) days of the service or mailing of this notice, petition the appropriate Federal or state court to prohibit disclosure of the records and provide such court with a sworn statement of the reasons why you believe the records should not be disclosed. Otherwise, upon the expiration of seven days, the records sought may be made available."; and

(2) concurrent with notification of the customer under subsection (a)(1), serve a copy of the process or request and a notice stating the rights, obligations and liabilities of a financial institution under this title upon the financial institution from which the records are sought.

(b) Upon application of the government authority, the customer notice required under this section may be delayed by order of an appropriate court if the presiding judge or magistrate finds that:

(1) the investigation being conducted is within the lawful jurisdiction of the government authority seeking the financial records;

(2) the records are being sought to obtain information which may be relevant to a legitimate law enforcement purpose; and

(3) there is reason to believe that such notice will result in—

(A) endangering the life or physical safety of any person;

(B) flight from prosecution;

(C) destruction of or tampering with evidence;

(D) intimidation of potential witnesses; or

(E) otherwise jeopardizing an investigation or official proceeding, or unduly delaying a trial or ongoing official proceeding, of the government authority.

(c)(1) If the court makes the findings required in subsections (b)(1), (2) and (3), it shall enter an ex parte order granting the requested delay for a period not to exceed ninety (90) days and an order prohibiting the financial institution from disclosing that records have been obtained or that a request for such records has been made: *Provided, That,* if the records have been sought by a government authority exercising financial controls over foreign accounts in the United States under Section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b)); the International Emergency Economic Powers Act (Title II, Public Law 95-223); or Section 5 of the United Nations Participation Act (22 U.S.C. § 287(c)), and the court finds that there is reason to believe that such notice may endanger the life or physical safety of a customer or group of customers, or any person or group of persons associated with a customer, the court may specify that the dela bye indefinite.

(2) Extensions of the delay of notice of up to ninety (90) days may be granted by the court upon application, but only in accordance with this subsection. Upon expiration of the period of delay of notification, the customer shall be served with or mailed a copy of the process or request together with the following notice:

"Records concerning your transactions which are held by the financial institution named in the enclosed process or request were supplied to or requested by the government authority named in the process or request on (date). Notification was withheld pursuant to a determination by the (title of court so ordering) that such notice might (state reason) .The purpose of the investigation or official proceeding was (purpose)." (d) When access to financial records is sought pursuant to section 1102(d) (search warrants)—

(1) No later than ninety days after the government authority serves the search warrant it shall serve upon the customer, or mail by registered or certified mail to his last known address, a copy of the search warrant together with the following notice:

"Records concerning your transactions held by the financial institution named in the attached search warrant were obtained by (agency or department) on (date) for the following general purpose:"

(2) Upon application of the government authority, an appropriate court may grant a delay in the notice required in subsection (1), which delay shall not exceed one hundred and eighty days following the service of the warrant, if the court makes the findings required in section 1109(b). If the court makes such findings, it shall enter an ex parte order granting the requested delay and an order prohibiting the financial institution from disclosing that records have been obtained or that a search warrant for such records has been executed. Additional delays of up to ninety days may be granted by the court upon application, but only in accordance with this subsection. Upon expiration of the period of delay of notification of the customer, the following notice shall be mailed to the customer along with a copy of the search warrant:

"Records concerning your transactions held by the financial institution named in the attached search warrant were obtained by (agency or department) on (date). Notification was delayed beyond the statutory ninety-day delay period pursuant to a determination by the court that such notice might (state reason)."

(e) Within thirty days after the expiration of a delay (or each extension thereof) granted under this section by a court of the United States, the judge or

magistrate granting the delay shall report to the Administrative Office of the United States Courts:

(1) the fact that a delay or extension of delay was requested;

(2) the nature of the investigation;

(3) the disposition of the request for delay;

(4) the total period of time for which notice had been previously withheld; and

(5) the identity of the government authority requesting the delay.

In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for extension of delay and the number of extensions granted during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office pursuant to this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by this section.

(f) When access to financial records is obtained pursuant to section 1112 (emergency access), the government authority shall, unless a court authorizes delay of notice pursuant to section 1109 (b) and (c), as soon as practicable after such records are obtained serve upon the customer, or mail by registered or certified mail to his last known address, a copy of the request to the financial institution together with the following notice:

"Records concerning your transactions held by the financial institution named in the attached request were obtained by (agency or department) on (date) for the following general purpose: Emergency access to such records was obtained on the grounds that (state grounds)."

(g) All memoranda, affidavits and other papers filed in connection with a request for delay in notification shall be preserved by the court and, upon petition by the individual to whom such records pertain, the court may order disclosure of such court papers to the petitioner upon a finding that disclosure would not have any of the effects specified in section 1109(b)(3).

CUSTOMER CHALLENGE PROVISIONS

SEC. 1110 (a) Within seven (7) days of service or mailing of notice pursuant to Section 1109, a customer may file a motion to quash an administrative summons or a court order, other than a search warrant or federal grand jury subpoena, or an application to enjoin a government authority from obtaining financial records pursuant to a formal written request, in the appropriate United States District Court, if the government authority is a federal government authority, or in the appropriate state court if the government authority is a state government authority, with copies served upon such government authority and the financial institution. Such motion or application shall contain an affidavit or sworn statement—

(1) stating that the applicant is a customer of the financial institution from which financial records pertaining to him have been sought; and

(2) showing a factual basis for concluding that the financial records are not sought to obtain information which may be relevant to a legitimate law enforcement purpose, or there has not been substantial compliance with the provisions of this title.

(b) If the court finds that the customer has made the requisite showing in subsection (a), it shall order the government authority to file a sworn response, which may be filed in camera if the government so elects. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within five (5) days.

(c) If the court finds that the applicant is not the customer to whom the financial records sought by the government authority pertain, or that the records are being sought to obtain information which may be relevant to a legitimate law enforcement purpose and that there has been substantial compliance with the provisions of this title, it shall deny the motion or application, and, in the case of an administrative summons or court order other than a search warrant or federal grand jury subpoena, order such process enforced. If the court finds that the applicant is the customer to whom the records sought by the government authority pertain, and that the financial records are not being sought to obtain information

which may be relevant to a legitimate law enforcement purpose, or that there has not been substantial compliance with the provisions of this title, it shall order the process quashed or shall enjoin the government authority's formal written request.

(d) A court ruling denying a motion or application under this section shall not be deemed a final order and no interlocutory appeal may be taken therefrom by the customer. An appeal of a ruling denying a motion or application under this section may be taken by the customer (i) within such period of time as provided by law as part of any appeal from a final order in any legal proceeding initiated against him arising out of or based upon the financial records, or (ii) within thirty (30) days after a notification that no legal proceeding is contemplated against him. The government authority obtaining the financial records shall promptly notify a customer when a determination has been made that no legal proceeding against him is contemplated. After one-hundred and eighty (180) days from the denial of the motion or application if the government authority obtaining the records has not initiated such a proceeding, a supervisory official of the government authority shall certify to the appropriate court that no such determination has been made. The court may require that such certifications be made, at reasonable intervals thereafter, until either notification to the customer has occurred or a legal proceeding is initiated as described in subsection (i).

(e) The challenge procedures of this section constitute the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this title.

(f) Nothing in this title shall enlarge or restrict any rights of a financial institution to challenge requests for records made by a government authority under existing law. Nothing in this title shall entitle a customer to assert the rights of a financial institution.

DUTY OF FINANCIAL INSTITUTIONS

SEC. 1111. Upon receipt of a request for financial records made by a government authority pursuant to section 1102 (b) or (c) the financial institution, unless otherwise provided by federal law, must proceed to assemble the records and must be prepared, at the end of the designated time period for bringing a customer challenge or (if such challenge is brought) at the end of the period allowed for such process, to deliver the records to the government authority.

EMERGENCY ACCESS

SEC. 1112. (a) Nothing in this title shall prohibit a government authority from obtaining financial records upon the written representation to the financial institution by the government authority that delay in obtaining access to such records would create imminent danger of—

(1) physical injury to any person; or
(2) serious property damage; or
(3) flight to avoid prosecution.

(b) Within five (5) days of obtaining access to financial records under this section, the government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the government authority setting forth the grounds for the emergency access. The government authority shall thereafter comply with the notice provisions section of 1109(f).

FOREIGN INTELLIGENCE AND PROTECTIVE ACTIVITIES EXEMPTION

SEC. 1113. (a) Nothing in this title (except section 1117) shall apply to the production and disclosure of financial records pursuant to requests from:

(1) a government authority authorized to conduct foreign counter-or foreign positive-intellignce activities for purposes of conducting such activities; and

(2) the Secret Service for the purpose of conducting its protective functions (18 U.S.C. § 3056; 3 U.S.C. § 202, P.L. 90–331, as amended).

(b) In the instances specified in subsection (a), the government authority shall submit a sworn statement to the financial institution that the financial records are being sought for an exempt purpose under this title.

(c) No financial institution, or officer, employee or agent of such institution, shall disclose to any person that a government authority has sought or obtained access to a customer's financial records pursuant to this section.

USE OF INFORMATION

SEC. 1114. Financial records obtained pursuant to sections 1102, 1112, 1113, or 1115 shall be subject to the prohibitions on use, transfer or disclosure of information contained in present law.

EXEMPTIONS

SEC. 1115. (a) Nothing in this title (except section 1117) shall apply to any subpoena or court order issued in connection with proceedings before a federal grand jury.

(b)(1) This title shall not apply when financial records are sought by a government authority in connection with an official proceeding, investigation, examination or inspection directed at the financial institution in possession of such records.

(2) When records are sought pursuant to this subsection, the government authority shall submit a sworn statement to the financial institution that the records are sought for an exempt purpose under this title.

(3) Notwithstanding section 1114, financial records obtained pursuant to this subsection may not be transferred to another agency or department but information in such records relating to a potential civil, criminal or regulatory violation may be disseminated to other agencies or departments which may then seek access to the records pursuant to the provisions of this title.

(c) Nothing in this title shall apply to the dissemination of any financial information which is not identified with or identifiable as being derived from the financial records of a particular customer.

(d) Nothing in this title shall apply to the making of reports or returns required in accordance with any statute or regulation.

(e) Nothing in this title shall apply to the dissemination of financial information in accordance with the procedures set out in section 1205 of the Tax Reform Act of 1976 (Public Law 94–455; 26 U.S.C. 7609).

(f) Nothing in this title shall apply to the examination by or disclosure to any supervisory agency of financial records in the exercise of its supervisory, regulatory and monetary functions.

(g) Nothing in this title shall apply when financial records are sought by a government authority under the Federal Rules of Civil or Criminal Procedure in connection with litigation to which the government authority and the customer are parties.

(h) Notwithstanding any other provision of this title, sections 1109 and 1110 shall not apply when a government authority, by a means described in section 1102 and for a legitimate law enforcement purpose, seeks only the name, address, account number, and type of account of any customer or ascertainable group of customers associated: (1) with a financial transaction or class of financial transactions or, (2) with a foreign country or subdivision thereof in the case of a government authority exercising financial controls over foreign accounts in the United States under Sections 5(b) of the Trading with the Enemy Act (50 U.S.C. App. § 5(b)); the International Emergency Economic Powers Act (Title II, Public Law 95–223); or Section 5 of the United Nations Participation Act (22 U.S.C. § 287(c))

SUSPENSION OF STATUTES OF LIMITATIONS

SEC. 1116. If any individual files a motion or application under this title which has the effect of delaying the access of a government authority to financial records pertaining to such individual, any applicable statute of limitations shall be deemed to be tolled for the period extending from the date such motion or application was filed until the date upon which the motion or application is decided.

COST REIMBURSEMENT

SEC. 1117. A government authority shall pay to the financial institution providing financial records in accordance with the procedures established by this title a fee for reimbursement for such costs as are reasonably necessary and which have been directly incurred in searching for, reproducing, or transporting books, papers, records, or other data required to be and actually produced. The Board of Governors of the Federal Reserve System shall by regulations establish the rates and conditions under which such payment may be made for such reimbursement.

JURISDICTION

SEC. 1118. An appropriate United States District Court shall have jurisdiction of an action to enforce any provision of this title involving a federal government authority, without regard to the amount in controversy, within two (2) years of the date on which the alleged claim arises or the date of the discovery of such alleged claim, whichever is later. Each state shall confer jurisdiction upon an appropriate state court of an action to enforce any provision of this title involving a state government authority, without regard to the amount in controversy, within two (2) years of the date on which the alleged claim occurs or the date of discovery of such alleged claim, whichever is later.

CIVIL PENALTIES

SEC. 1119. (a) Any government authority, financial institution, or agent or employee of such institution obtaining or disclosing financial records or information contained therein in violation of this title is liable to the customer to whom such records relate in an amount equal to the sum of:

(1) $100 (one hundred dollars) for each collective or transactional violation of this title without regard to the volume of records involved in each such violation;

(2) any actual damages sustained by the customer as a result of the violation;

(3) such punitive damages as may be allowed, if the violation is found to have been intentional or willful; and

(4) in the case of any successful action to enforce liability under this section, the costs of the action together with reasonable attorneys fees as determined by the court.

(b) Any financial institution or agent or employee thereof making a disclosure of financial records pursuant to this title in good faith reliance upon representations by any government authority shall not be liable to the customer for such disclosure.

(c) The remedies and sanctions described in this section shall be the only authorized judicial remedies and sanctions for violations of this title.

Mr. HEYMANN. Mr. Chairman and members of the subcommittee, I am pleased to be here today to present the views of the Department of Justice on H.R. 214, the Bill of Rights Procedures Act. Title I of this bill, which will be the principal focus of my testimony, as the chairman has just indicated, would create a legally protectible privacy interest of an individual in the records maintained by a third-party recordkeeper.

It would generally bar access by the Government to the records unless the individual had been notified and afforded an opportunity to challenge the Government's right to such access in court.

As you know, Mr. Chairman, the question of the privacy rights of individuals, with respect to records of their transactions in the possession of third parties, has been and continues to be a matter of considerable controversy, because of the vital role that such records play in law enforcement.

This subcommittee has played a crucial and important role through its pioneering efforts to the 94th Congress to develop workable legislation in this area in the wake of the Supreme Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976), holding that the fourth amendment provides no protection to the subject of bank records owned and possessed by financial institutions.

In 1976, when this Department last communicated its views to this subcommittee, it took the position that legislation like title I of H.R. 214 was fundamentally misguided and unacceptable. Its view then was that such legislation was inherently inconsistent with important needs of law enforcement for ready access to financial records, and it

saw no way then by which such legislation could be fashioned so as to reconcile the dual interests of customer privacy and legitimate law enforcement.

During the present session of the 95th Congress, we in the Justice Department have reexamined this issue and, as the chairman is aware, the Department has changed the position formerly taken.

We now favor legislation incorporating the basic principles of title I of H.R. 214, provided that certain significant amendments are made to better accommodate the needs of law enforcement. Most of those amendments have been incorporated in the House Banking Committee bill which has just been reported out.

We in the Justice Department do have the responsibility of assuring Americans that we are doing all that we can to enforce criminal laws effectively and to protect what we regard as necessary to law enforcement. At the same time, we are sensitive to the erosion of personal privacy that has resulted from advances in technology and from the changes in the way business is done in the modern world.

It is in this light we have changed the position the Justice Department formerly took. We now take the position that some accommodation, very much along the lines of H.R. 214, and even closer to the lines of the House Banking Committee bill, is necessary.

The Justice Department has testified on a number of bills very similar to title I of H.R. 214, the Banking Committee bill, S. 2096 in the Senate, and in the course of presenting such testimony we have offered a draft of legislation which incorporates all of our recommendations.

I have attached to my statement a copy of our proposed statutory text.

Our proposal broadly endorses the core principle of title I that, in general, an individual should be granted a statutory right of privacy in certain kinds of records held by third-party recordkeepers and, subject to appropriate exceptions, should be given fair notice that the Government is seeking access to these records and an opportunity to object in court before information is disclosed to the Government.

These broad principles are adopted by the Justice Department as they are in H.R. 214.

Now, let me refer to several major areas at least in passing.

We believe the bill should apply only to individuals and not to business organizations or units. As a guiding principle, we believe that the provisions of the bill should apply no more broadly than necessary to achieve the desired result, and this leads us to the conclusion that they should be applicable to individuals and natural persons, and not to corporations and other legal entities.

It is significant in this regard that the coverage of other statutes seeking to afford privacy protection, such as the Privacy Act of 1974, are limited to the records of natural persons. This distinction we feel should be incorporated in privacy legislation such as this as well.

As to the kinds of records covered, the proposal we wrote in response to other legislation covers the records of all types of depository institutions organized under the laws of or with their principal place of business located in the United States or any State.

Contrary to H.R. 214, however, our proposal does not extend to telephone toll records. Although we have not yet reached a final

judgment as to whether any or what sort of additional protection is needed for telephone toll records, our general view is that only some personal records should be covered by this new legislation.

While there are other records which contain information such as that contained in financial records in which an individual should have a legitimate expectation of privacy, there are other records in which such an expectation is unwarranted. Telephone toll records may eventually, in our view, fall in the protected category or not in the protected category but the answer seems to us to be wholly unclear at this point.

The President, as you know, is conducting a review that will lead to what I believe is called a policy review memorandum (PRM), and the question of telephone toll records will be discussed and considered more extensively there.

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. The gentleman from Massachusetts?

Mr. DRINAN. Could I ask the witness to elaborate?

Why is it unclear? How are they qualitatively different from the bank records?

Mr. KASTENMEIER. That is a good question. That question has been around for a while. The issue of telephone toll records is not altogether that new. I know in Madison, Wisconsin, we had cases of toll records of individuals being sought for whatever reason by Government agents years ago.

I don't see why there should be some degree of uncertainty, or what distinction can be made really?

Mr. HEYMANN. I will tell you what the distinction is, in my mind, Mr. Chairman and Congressman Drinan.

It's the volume of information that is potentially contained in one set of records versus the other. If the Government were to get my checkbook and read the stubs, which in effect is what happens with banking records, the Federal Government, or a State government, so that I can make the example a little bit more realistic, would get a quite complete picture of my life.

Mr. DRINAN. The same information they get from the telephone toll records?

Mr. HEYMANN. Congressman Drinan, local calls, for example, for the great majority of people, are not recorded by number, I believe. In other words, there is nothing in a toll record that would indicate any local calls.

All that would be indicated would be the phone numbers on long distance calls. A relatively small part of my life and of most people's lives is long distance calls and, what's more, though I would like to make less of this—I don't think it's an overwhelming point—less about the nature of a transaction is revealed by knowing a long distance number called, than is revealed by an ordinary check that frequently tells what it was for, and certainly tells who was the receipient.

Any number of people can be on the other end of even an identified phone number and the nature of the transaction is never revealed by a telephone toll record. So, in short, the three differences as to the scope of privacy interest involved are one, it's a much less full record of the average person's life since tolls are not, I believe, kept on most private, non-long-distance phone calls.

Two, even where you have a record of a long distance call, you don't even get the name of the recipient, all you get is the name of the person who owns the house. And, three, you never know the nature of the transaction, which a bank record, or bank stub does show.

I think there is a difference in terms of privacy, a significant difference in privacy. The difference might lead one to want to include toll records or not. My argument now is that it is a significant enough difference so that the House Banking Committee bill, which reaches only banks and credit cards, would be a good starting place.

Mr. KASTENMEIER. On that point, and I agree with the implication of the question of the gentleman from Massachusetts, it is obvious why the Banking Committee did not deal with toll records.

Mr. HEYMANN. I understand.

Mr. KASTENMEIER. But I rather disagree with you, I must say, respectfully. I think a record of long distance calls to a person at a given point in time or a station, even, is as revealing as the stubs of a check to a person or an entity with an amount in it.

As a matter of fact, I would think in the long term that the telephone calls would be more revealing. Very often financial transactions may not in fact, relate, especially in the national security area to anything recorded at all. But long distance phone calls might reveal to whom, what date, and whether there were a number of calls made.

I think you could get a far more revealing picture potentially from that, and what I am suggesting is that it may be that law enforcement agents would almost less rather give up the right to that sort or intrusion than the other.

I think they are basically analogous. You have the third-party telephone company, A.T. & T. and, increasingly, like most banks, they are much more sensitive about yielding up information concerning patrons, customers, than they used to be.

As you know, 10 years ago, 15 years ago they were easily coopted, all of them. But within the last 10 years, even the telephone company, which was one of the worst in terms of being coopted, has gotten very tough in terms of company cooperating with the Government.

Just like the banks it does not want to be in an antagonistic position with reference to its patrons. So I think, if anything, at the very least it is analogous. As far as toll records are concerned, I think it might be or could be more revealing concerning the privacy of the person involved, but continue, Mr. Heymann.

Mr. HEYMANN. I would like to just react to that very briefly, Mr. Chairman.

I understand the last point you are making to be an important one, and that is that perhaps we will find that we need a bill that protects the telephone company in delivering toll records, and H.R. 214 embodies that feeling.

I understand the privacy aspect of telephone toll records, but I still feel a little bit differently than you do about it. I don't want to belabor it. When I think about bank records, every doctor I see would be revealed by bank records, every organization I contribute to would be revealed by bank records, all of my political associations, my medical problems, any religious associations I have would likely be revealed by bank records.

Long distance phone calls seem to me to be much less likely to reveal these things. I agree with you that there is a distinct analogy,

they are not in a different ballpark, there is legitimate room for disagreement, but I just wanted to state those particular privacy interests that don't seem to me to come up in the same way.

Mr. KASTENMEIER. I appreciate we may view that point differently.

Thank you, Mr. Heymann.

Mr. HEYMANN. The next matter is access through process.

A central position of H.R. 214 is its requirement that the Government use legal process to obtain access to an individual's record. By so doing, the legislation prohibits informal access. The problem we have with this is that the scheme——

Mr. KASTENMEIER. Mr. Heymann, may I interrupt?

I think Mr. Drinan has left and we do, in fact, have a vote pending. There are only two of us here. We can perhaps do a bit better following the vote. So perhaps this would be a good time to recess for 10 minutes, at which time we will get back and resume.

The committee, accordingly, will recess for the minutes.

[A short recess was taken.]

Mr. KASTENMEIER. The committee will come to order.

That vote, incidentally, was on whether or not to impeach the Ambassador to the United Nations, or to put it another way, whether to look forward to political trial of our dissident Andrew Young. To the surprise of everybody, the motion failed.

Mr. Heymann, would you please continue where we left off?

Mr. HEYMANN. Mr. Chairman, with your approval, I think I will proceed quickly through the remainder of my statement, pointing out mainly the major changes and the major issues as we go through, because I would like very much to have some time to discuss with you and with any other members that are present two amendments that were added in the House Banking Committee that cause us some concern; and I would like to be able to express why it causes us some concern.

Mr. KASTENMEIER. I was going to ask you about that. As a matter of fact, it might be useful from your perspective, as someone who is working with the Banking Committee and someone who is very closely monitoring what the Banking Committee has been doing over a number of weeks, both the subcommittee work, markup, and the full committee, to mention what the Banking Committee did and what your view of it was.

For example, there are at least two amendments, one by Mr. McKinney relating to interagency transfer of records causes you difficulty, and I am not sure about the one dealing with grand jury information, but if you could comment as broadly as you care to do so on the work of the Banking Committee and your own reservations, it would help this committee.

Mr. HEYMANN. Would you prefer that I do that first, or after running through the provisions of the bill, Mr. Chairman. Do you think now is an appropriate time, or would you rather later?

Mr. KASTENMEIER. I suppose, logically, you might run through the provisions of the bill first.

Mr. HEYMANN. I will do so quite quickly.

Where we were at the break, Mr. Chairman, was discussing the requirement that banking records and whatever other records are covered be obtained only by process. This requirement has the problem

that not all the agencies that now obtain records and have to obtain records have the right of process.

For example, the Federal Bureau of Investigation has no administrative summons power. We have proposed dealing with this and the Banking Committee has adopted our proposal—and it seems to me quite ingenious, and I had nothing to do with creating it—a formal request which, in effect, guarantees the bank or the holder of whatever records are involved that no action can be taken against it for voluntarily delivering the records. In other words, we have recommended, and the Banking Committee has adopted, a provision which simply is a formal request to the holder of records that immunizes the holder of records from any liability, civil or criminal, for delivering the records, but does not require the delivery of the records.

We rely on cooperation. Of course, it requires—Mr. Pauley correctly reminds me—all the notice provisions that would be required for an administrative subpena or any other form of complusory process. It has all the protections; it simply doesn't have the coercive power. It seems to me quite a nice solution.

Mr. KASTENMEIER. On that point, are you informed as to whether, for example, banking institutions might take a position that they would not comply without a more formalized way of proceeding? In other words, this may be an empty provision if, in fact, the banks collectively decide, "No, we want to be served with the proper papers," and would not comply with an informal request.

Do you not have that possibility?

Mr. HEYMANN. I think we, quite frankly, regard this as a provision necessary for law enforcement purposes; in other words, we would like—and believe it is necessary—for agencies like the FBI to be able to obtain bank records, as they have been, after a whole new set of privacy procedures are imposed on them.

To do that, we need this kind of formal authorization. We want it because banks may withhold the records otherwise; but along with giving us what we need for law enforcement, we are accepting, and indeed inviting, substantial privacy protections in that case as in every other. We have to give notice; there has to be an opportunity to object; a judge has to rule on it if there is an objection.

Mr. Pauley would like to add something to that.

Mr. PAULEY. Banking associations were contacted on this question and the word we received was that they were satisfied that as drafted this would protect them against any subsequent possibility of civil liability, and therefore, their reluctance based upon those grounds to turn over records once a customer had exhausted his rights should be adequately dealt with; and we will simply have to rely, as we do now, on the cooperation of banks once proper legal procedures have been complied with to help us in our law enforcement efforts.

But if we do not have a procedure of this kind, the net result would be an overuse of the grand jury system. Anytime a lead had to be tracked down involving third party financial records, if there were no formal written requests procedure available to the FBI and to a number of other law enforcement agencies, they would be compelled to ask the U.S. Attorney to convene a grand jury investigation of the matter, so as to be able to utilize the grand jury subpena as the method of obtaining those records. We don't think that is a desirable result, and that is part of the reason why this other procedure was developed.

Mr. HEYMANN. On notice, Mr. Chairman, there are two exceptions to the general requirement that the subject of the records be advised whenever applicable third-party records are being turned over. One, of course, is in the unusual emergency circumstance, a kidnapping, an immediate bomb threat, something like that, where we feel we have to be able to act immediately and then afterwards go through the formal procedures—a very narrow and exceptional category.

A broader category is one where giving notice is likely to result in any of four or five dangers. In those cases we recommend that a judge be allowed to delay notice. Those four or five circumstances are not only danger to life or physical safety but also an occasion when giving notice would lead to the subject fleeing from prosecution, destroying evidence, attempting to intimidate witnesses, or in any other way jeopardizing an investigation, not at all unlikely circumstances to occur, certainly not the general rule, but not very unusual.

Along with notice, the customer of the banking institution or the subject of whatever records are involved has to have an opportunity to challenge. We have felt it important to try and get that challenge carried out in a short period of time and to direct judicial officers to respond to the challenge in a short period of time.

One of the things that has worried us most on the law enforcement side is the possibility of any procedures in a privacy bill being used for no other purpose than to delay. Delay is a problem in the entire law enforcement area that we all want to take seriously, and we all do take seriously.

In our proposal, we give the customer the burden of going forward and seeking to stop the revelation of whatever records are being sought. I don't myself regard that as crucial, one way or the other. Some experience with the Tax Reform Act led us to think that if we had the burden, there would be too many frivolous objections. I don't think that is a major point one way or the other.

We similarly think, for reasons of making sure that these privacy protection provisions are not used as a device for delay, something has to be done to make sure that there isn't an interlocutory appeal that can be taken. Our proposed bill and the bill passed by the Banking Committee require appeals to be delayed and not taken immediately.

We also would allow in-camera inspection of the Government's response to a customer challenge in appropriate circumstances where some showing is made. There our desire is that the procedures not be turned into a device for pretrial discovery. There is discovery, but limited discovery, in criminal areas and I think as a general rule that procedures always have to be examined to determine whether they will be used to expand what is currently a relatively narrow discovery right in criminal trials.

I am going to skip, Mr. Chairman, the subject of use of information, a transfer of information, because I want to return to these subjects in terms of the bill reported out by the House Banking Committee.

We have provisions on penalties which are somewhat different than the ones in H.R. 214. I don't think these are significant. We urge the coverage of State authorities as well as Federal authorities, simply as a matter of the logic of privacy. No one can feel very much privacy if half the governmental authorities have access to his or her records and the other half don't.

In the exemption area, I know that the chairman has written a letter to the Banking Committee, describing a concern about any inclusion of the Federal grand jury, and the grand jury provisions were largely omitted. The extent to which they were included in the bill ordered reported out by the Banking Committee is the second subject I would like to close on, a major subject.

We feel it is important that there be special provisions for counter-intelligence and national security matters. That is included in the Banking Committee bill. I think those are the major places that we may have differed with the chairman's initial bill.

The next two titles of your bill I think I could leave to our written statement—on mail covers and on the expansion of the wiretap statute. Both of them we agree with in principle. On one of them we are worried about the drafting involved.

If I may, I would like to turn, unless the chairman has anything specific——

Mr. KASTENMEIER. No; please continue.

Mr. HEYMANN. Two amendments were added in the House Banking Committee, one by Mr. McKinney and one by Mr. Mattox, Mr. Chairman. The broader amendment picks up a provision from the original H.R. 214 dealing with access to records and the transfer of records. The narrower is, I believe, a newly written provision by Mr. Mattox dealing with access to subpenaed materials.

It would probably be better to begin with the broader one, which is the one that deals with access. We have three sorts of problems with each of these provisions, Mr. chairman.

We agree in principle that any privacy bill has to worry about access and what is done with records, and we agree in principle that there should be an access provision. We don't agree that anything should deal with subpenaed records at all separately in this bill, because the grand jury is not included. But our objection is not one of principle.

Our objections to Mr. McKinney's and Mr. Mattox' amendments are largely to the drafting and to the consequences of them, but they are more than technical objections. It would be deceptive if I suggested they were technical. We have substantive objections.

We would happily offer our own versions if there were an opportunity to deal with the objections I am about to describe. I think the most useful thing is to describe what the problem we see is.

Let's begin with the broad provision with regard to access. It states that in the Banking Committee bill financial records obtained pursuant to title XI of the bill "shall not be used or retained in any form for any purpose other than the specific statutory purpose for which the records were originally obtained." In short, the financial records obtained under this bill cannot be used or retained in any form for any purpose other than the specific statutory purpose for which the records were originally obtained.

It has another clause that is troublesome to us, but I think it would be most helpful if I just focused on that one.

There are practical problems with any such provision. If the SEC obtains financial records pursuing a stock violation and finds records of a payoff to a State legislator or to a foreign government, it seems to us to be most natural and most convenient that those records which reveal another crime, a crime at least as serious as the one the SEC was

pursuing, be available and be made immediately available to the proper agency—in that case it might be within the SEC or it might be in the Justice Department—charged with investigating the crime that is revealed by records which were properly obtained.

This is just a specific application of a very general principle in the law of privacy. The general principle which comes first from the fourth amendment is that what Government personnel fairly see, legally see, legally obtain, can be used for any law enforcement purpose. That is the general principle. There is not inherent reason why it has to be applied here except for the reasons I am about to state, but it is the general rule.

The first reason why I think it ought to be applied here is that there are, at a minimum practical problems with requiring some form of elaborate resubpena procedure to be used when the SEC or the Antitrust Division obtains information that is properly obtained, in full compliance with the requirements for access, but information that is obviously relevant to another criminal allegation.

It is not even clear to me, on the face of the bill as it is currently written, that it would be proper for the agency obtaining the information to notify the other agency or another section that that second agency or section should go about obtaining it by subpena. I am told that the legislative history of the provision, the discussion that went into it when it was first submitted, would make that clear. But even if it makes it clear, it imposes on us what we think is an unnecessarily burdensome process.

I want, though, to make a broader point. There are general statutes which this Congress has passed to deal with the handling of records within the executive branch in order to guarantee privacy. An amendment such as Mr. McKinney's departs from those statutes, with two consequences: One, it amounts to piecemeal legislation which requires us to handle different sets of materials differently internally. It means that we are going to have to watch all our sets of materials and see which come from what sort of process, handle some in connection with the Privacy Act, some in connection with title XI of the Bank Reform Act, some in connection with another statute—all this without any showing that the Privacy Act is inadequate.

My first two points, then, are that it does create administrative difficulties, in the sense that it requires us to go through burdensome steps unprecedented elsewhere in the law to use evidence plainly obtained in full compliance with privacy considerations just for another crime.

Second, it starts to create piecemeal exceptions to a general statute recently passed for access within the Government to documents obtained, the Privacy Act of 1974. And, third—and this is the one I feel embarrassed to say, but I feel strongly about—it picks up the most recent addition to protected categories, in this case bank records and credit card records, an addition that we agree should be made, but certainly not the most compelling private documents, not medical records, not even the business records of an individual; it picks up the most recent additions—something that should be protected, but that is not the most compelling case for protection—and gives them a fuller measure of protection than any other record.

Not only does it do this, not only does it do it to types of record that will be the newest addition to the privacy category, and a type of record that is somewhat less sensitive than other things that have long been in the privacy category, but also it does it for a category of people that are not the ordinary criminal.

We are dealing with the type of criminal, the type of alleged violation, that takes place among wealthy people. We are dealing with bank records, credit card records, maybe telephone records, and so we are dealing generally with white-collar crime. We are not dealing with street crime; and we are saying that white-collar crime records—the records of people in a certain economic category—are going to get a special level of protection greater than medical records obtained under a subpena.

That is my set of objections. My objections are: One, Mr. McKinney's amendment makes it difficult for us to enforce the law; two, it is going to make it difficult for us to keep our papers; three, it starts a precedent of piecemeal exceptions to a recently passed law for that very purpose by Congress; and, four, it gives special protection, without justification that I know of, and greater protection to the newest addition to the privacy category and to a set of records that seems obviously tied to a particular economic status in some way.

I think if it is all right, I would do the same thing, quickly, with regard to the subpena provision and then see what Mr. Pauley would add to that, Mr. Chairman. Excuse my adamance on it, but I feel strongly on that.

There is no other provision in the House bill which deals with grand jury subpenas. I suspect that we have you, Mr. Chairman, to thank for that, because we certainly feel it is justified and important that the grand jury not be handled in the same bill, for a variety of reasons that I don't think I have to rehearse with you.

I suppose we can live with Mr. Mattox's subpena provision, but it does each of the four things that I have just described, as well as adding a special provision for grand juries at the later stages with regard to retention and use of grand jury documents whenever other aspects of the grand jury were excluded.

Let me just run through it quickly, Mr. Chairman, so that I don't understate the difficulties when I say we can live with it.

I think it is wholly unjustified and I would urge strongly that something be done to amend in this regard, Mr. Chairman.

Again, the provision would cause us certain practical problems, but I think perhaps there has been too much focus on that. For example, paragraph 2 of the provision limits us in ways that are substantially greater than the limitations that were placed on grand jury evidence subpenaed from anybody except a banking or credit card institution under the provisions passed last year by the House in rule 6(e) of the Federal Rules of Criminal Procedure.

Last year the House effected a major change in the law with regard to the handling of materials subpenaed by a grand jury—rule 6(e). It replaced the Supreme Court rule by passing its own version of rule 6(e). It is a major change. The rule passed last year, for example, with regard to paragraph 2, would allow a prosecutor who subpenaed documents to use those documents in presenting additional charges to the same grand jury.

In presenting additional charges to a new grand jury, a Federal prosecutor could, without court order if it were a Justice Department official, use subpena documents in a civil suit under rule 6(e).

With court approval, any other documents can be made available to State officials for judicial proceedings or for investigations leading to judicial proceedings.

Under rule 6(e), as amended last year, the documents can be handled by Federal agents in cooperation with the grand jury as long as we keep records of whom we entrust with grand jury materials.

My point here can be made in a general form. I could give you horrible cases and say what do we do in this case—and there are difficult cases for us to handle—but my point is that just last year, rule 6(e) was passed through the Judiciary Committees by the House and the Senate, and the provision proposed by Mr. McKinney is inconsistent with it in substantial ways.

Now as to those ways, we believe we should be entitled to use the evidence obtained by a grand jury subpena, but I am not bothering to belabor that.

The point I want to make is that a statute has been passed—rule 6(e), carefully, deliberately—coming out of the Judiciary Committee, dealing with grand juries, where we believe grand jury matters should be handled, and dealing consistently with these matters.

Again, my same line of four points would be made. We think rule 6(e) is right in what it allows us to do. We think piecemeal amendments are unwise. We think grand jury matters ought to be handled in the Judiciary Committee. We don't think that special protections greater than any other grand jury subpenaed materials should be given to the newest entrant, albeit a valued member, in the privacy category, and this amendment would do all of those things.

Maybe we should give Mr. Pauley a chance to add a word.

Mr. KASTENMEIER. Mr. Pauley?

Mr. PAULEY. Thank you, Mr. Chairman. When Mr. Heymann mentioned the piecemeal quality of these amendments, I simply wanted to underscore that with some illustrations. Because title XI of the Banking Committee's bill covers only third-party financial records, the amendments restricting use that were adopted would have some very anomalous effects.

For example, if we obtained the same bank records, the same checks, not from a financial institution, which is the only thing that title XI of the Banking Committee's bill, or H.R. 214, for that matter, covers, if we did not obtain them from a financial institution but instead subpenaed them from the individual himself, then the provisions of existing law; that is, the Privacy Act in the case of Mr. McKinney's amendment and rule 6(e) in the case of Mr. Mattox's amendment—which allows us greater leeway in subsequent use of those lawfully obtained documents for law enforcement purposes would apply.

The anomaly that would be created if the Banking Committees' amendments are allowed to take effect is that a more stringent set of restrictions would be applicable if the same records were obtained not from their individual owner but from the third-party financial institution that is maintaining them for its own purposes.

Mr. HEYMANN. The exact same records will be handled in two different ways if this goes into effect, depending on whether we subpena them from the owner or from the bank.

Mr. Chairman, that is all I have to say. I think you have been very indulgent.

Mr. KASTENMEIER. Thank you, Mr. Heymann and Mr. Pauley.

On the latter point, I take it and I am not really familiar with the deliberations of the Banking and Currency Committee—that Mr. McKinney and others must have seen or cited some abuses from interagency referral of such materials to elicit support of their amendment. Is that not the case? Obviously, this was directed against either imagined or real abuses.

Mr. HEYMANN. Let me ask Mr. Lowell.

Mr. KASTENMEIER. Possibly the Cointelpro operation, which was a wide interagency referral of materials of this sort, to the disadvantage of all parties?

Mr. HEYMANN. I am sorry, Mr. Chairman. Mr. Lowell was telling me while you were asking your question that at the Banking Committee meeting there was no extended debate whatsoever of either amendment and there was no recitation of specific abuses. There was only an expression of the general concern about abuses. I missed what the chairman said.

Mr. KASTENMEIER. I said a vague recollection is that the Cointelpro and others may have abused interagency referrals of materials relating to individuals in a manner which caused enough apprehension to support Mr. McKinney's amendment. I can only speculate.

Mr. HEYMANN. I was tempted to give the committee, Mr. Chairman, an example from Watergate with regard to each of these, and on my side I was going to give an example of the fact that at the Watergate special prosecutor's office we had three or four grand juries running at the same time, using the same records that we had obtained from the Committee to Re-Elect the President.

All of this would become almost burdensome beyond belief if the two amendments were passed.

As to the Cointelpro, I think there is a record of misuse of documents obtained in one place for nongovernmental, nonlaw-enforcement-related purposes. I would think it was entirely appropriate that there be a provision such as the access provision, nothing to do with the grand jury, but a provision such as the access provision in any bill which emerged but one that—like the Privacy Act of 1974—allows a transfer of information for, and only for, legitimate law enforcement purposes within the jurisdiction of the agency. That would preclude and make illegal what was done in Cointelpro and anything like that, I believe.

Mr. KASTENMEIER. A possibility, and I concede it would not be as egregious as the abuses which may have taken place in the Cointelpro, is that even though for a legitimate law enforcement purpose or intelligence purposes, if one agency of the Government got another agency of the Government to be a stalking horse in terms of gaining access so it could remain in the background, never disclosed in terms of the ultimate demander or requirer of the material, that I think might be considered an abuse, at least some of the dark happenings of Government that Congress may be from time to time disposed to try to restrict.

Mr. HEYMANN. Mr. Chairman, I think that is another area of potential abuse, but that could be dealt with by requiring notification to the record subject whenever records were transferred among agencies or within reasonable limits within the Government, and we would happily endorse such a provision and it would deal with the very real problem that I just identified.

Mr. KASTENMEIER. In any event, I appreciate your comments and I think the Department does have a reasonable position with respect to the interagency transfer problem, and to the extent that you have not already done so in terms of Banking and Currency, if you care to make available to us any other amendatory language which deals with the problems you have cited, we would welcome such language.

Mr. HEYMANN. Thank you, Mr. Chairman. We would like to do that, I am sure.

Mr. KASTENMEIER. You indicated that a second exemption we advocate is when access to records is sought for the purpose of conducting foreign counter- or foreign positive-intelligence activities, et cetera. Just having been to the Rules Committee yesterday in terms of the Foreign Intelligence Surveillance Act, which called for warrants in certain cases: What is your position about attempting to make this area of activity conform with the foreign intelligence surveillance bill; that is, conform in the sense of obtaining warrants, and protecting American citizens, and so forth, in the field of these reports? I personally haven't given it any thought. There may be some other policy considerations that don't occur to me, but it would seem if we are going forward in the area of electronic surveillance and having very particular procedures prescribed for the executive branch why should we not do the same with reference to these activities?

Mr. HEYMANN. One of the advantages of my position, Mr. Chairman, is that I can turn a question over to Mr. Pauley, with your permission.

Mr. KASTENMEIER. Surely, Mr. Pauley?

Mr. PAULEY. I think our view was—and we did consider this quite carefully—that electronic surveillance is really sui generis; it is the most intrusive, invasive kind of technique for acquiring information, and it is reasonable and appropriate, I think, in that context to be talking about formalizing and indeed inaugurating a court-authorized warrant procedure with respect to that kind of necessary, but also necessarily invasive information-gathering technique.

What we are dealing with here, as Mr. Heymann mentioned before, is seeking to extend nonconstitutional privacy concepts to a new category of records heretofore unprotected under current law. I just don't think that in terms of the comparative privacy interests involved that third-party financial records can be equated with electronic surveillance; and the reason for the exception in this context, which also extends to the protective functions of the Secret Service, is that the premise on which the bill is built, of prior notice and challenge in court, would virtually never be appropriate in the foreign intelligence-gathering context.

You never want to give notice to the subject of a foreign intelligence investigation that you are, in fact, investigating him, because to do so will cause him perhaps to take measures that are harmful to the Nation.

Mr. KASTENMEIER. That is also true sometimes in this area.

Mr. PAULEY. Perhaps.

Mr. KASTENMEIER. By virtue of the bill itself. You have built-in exceptions to prior disclosure.

Mr. PAULEY. Yes. But I think that whereas the exceptions from notice provision that is necessarily in the bill now for general law enforcement purposes would be just that, an exception, in the foreign intelligence surveillance area, the matter would be turned around so that notice would be the highly exceptional situation, and that is why we have exempted it and basically left that to current law.

Finally, institutions would still be protected. They would be supplied under the Banking Committee's bill with a written certification from the Government that the documents were being sought for an exempt purpose under the statute. And thus, once in possession of such a certification, they would be entitled, free of subsequent civil liability, to rely on that certification and turn it over to us.

If the certification turned out to be falsified or was an abuse of authority, the customer whose privacy acts were invaded would have a right of action, but it would not be against the financial institution, it would be against the Government authority.

Mr. KASTENMEIER. I have several other questions. I would first like to yield to my colleague from California, Mr. Danielson.

Mr. DANIELSON. I would like to ask the Chairman to just continue. I have not had the benefit of the entire presentation, and you are way ahead of me.

Mr. KASTENMEIER. I will yield later if the gentleman cares to. Or I offer at any time if he cares to just break in with a question.

As you have indicated in your testimony, you suggest relatively a small class of personal records should be covered by the legislation. However, the Privacy Protection Study Commission recommended last year that all third-party-held records dealing with financial services be protected by legislation similar to this.

Can you elaborate why you take a far more limited view than this Commission did in terms of the extent of coverage?

Mr. HEYMANN. I think, Mr. Chairman, that our position simply reflects a desire to take one step into the water at a time, while we get the temperature. That is reinforced by the fact that the President will and does, indeed, have a privacy group working on the recommendations of the Privacy Commission, and though they don't like to state any guidelines, we are talking about a response on an executive-wide basis within a very few months at the latest, I think.

I don't think one can justify treating banking records as more sensitive ultimately than a psychiatrist's records, and those are medical records. It's just that other kinds of records seem to us to be a reasonable next step, and one that is being studied by the administration.

Mr. KASTENMEIER. And I concede there are differences. I can recall, as a matter of fact, testimony, maybe Mr. Danielson does, certain members of the medical profession tend to feel they already have a privilege, and they do not want the privilege conditioned by some sort of statutory access. So it becomes a somewhat more complicated matter.

Mr. HEYMANN. It's a position the press frequently takes with regard to press privileges, too.

Mr. KASTENMEIER. At least there is some ambiguity about just how they feel about this.

To clarify the proposal with respect to informal access to records, under your proposal, as I understand it, a third-party recordkeeper would remain free as under present law to ignore the written request if he chooses to do so.

Mr. HEYMANN. That is correct.

Mr. KASTENMEIER. And I was trying to explore whether there was any possibility that the banking association would recommend to its individual bank members that they not comply and that they only comply with a formal judicial process or administrative process in that connection and not comply with an informal request.

I wonder whether that really isn't a potential problem with this. Because it appears to me, as I observed before, whereas in past years third-party holders were easily co-opted by the Federal Government, that they have become increasingly zealous protecting their customer and have taken a rather hard line against informal cooperation and compliance.

Mr. HEYMANN. I think, Mr. Chairman, it's a matter we are going to have to watch over time. As you have just indicated, there has been a change over time in the extent of voluntary cooperation. The proposals that are embodied in the Banking Committee bill will eliminate one obstacle to voluntary cooperation.

You are suggesting, Mr. Chairman, that it may turn out not to be a crucial obstacle, and there may be other reasons why the banking industry may not want to cooperate. If that were so, we might have to return and ask for some very limited form of addition to the executive branch's present administrative summons powers. Only a very few agencies have it. We might have to ask that summons power be given to one or two more agencies.

Mr. PAULEY. Could I just add something to that?

Mr. KASTENMEIER. Yes, Mr. Pauley.

Mr. PAULEY. It is not really informal access in the sense that today's access is informal. What is proposed is to formalize that process in a way so that the financial institution, before it reached the position of deciding whether it would turn over the records voluntary to us, it would know that either the customer had not availed himself of his rights to challenge access, in other words, had waived those rights, or any challenge that he had made had been resolved unfavorably to the customer, so it's in that climate that the financial institution will be making its decision, and that is what causes us to be somewhat optimistic that they will at that point and in that context choose to turn over the information, even though not legally compelled to do so.

Mr. KASTENMEIER. I might say neither this bill nor any proposed amendments address the question of whether there should be any special procedures or protection situations where search warrants are sought for information in possession of the news media. In view of the controversy surrounding the Stanford Daily case, do you think first amendment principles suggest special protections for the members of the press?

Mr. HEYMANN. As the Chairman may know, I have testified on this issue on the other side of the Hill. There is no question what the position of the executive branch has been through any number of

changes of adminsitration, and that is to favor special protection for the press. There is no record of any Federal search of a press institution in the history of the country. There is none that anybody can find.

What is more, we have special regulations that deal with the issuance of even subpenas to the press. I am giving you a rough figure. Perhaps we subpenaed information on a truly contested basis as many as 10 times throughout the country last year or the year before. To place this in perspective, we have 40,000 Federal criminal cases a year. We will undoubtedly promulgate new regulations which again will express the executive branch's view that first amendment considerations require special protections for the press in the area of searches as we have already recognized in the case of subpenas.

We are doing a study, and I suspect this question will be decided at a very high level in the executive branch, as to our position on extending protection to the press against State searches as we have urged, for example, with the privacy bill. We have said this should be extended to States.

Whether is will be done by statute and extended to States I cannot say at this time because it will be the subject of a major study and it will be decided at least by the Attorney General and perhaps by the President.

Mr. KASTENMEIER. I understand.

Do you have any reaction to the issue of whether you might have an adversary proceeding or to the issuance of a search warrant which is directed against the holder of records who are not themselves the subject of the investigation?

Is that not a possibility? It seems to me perhaps some of the bills have suggested that as a way to go.

Mr. HEYMANN. The broader category which would include the press, but go far beyond the press to include all holders of evidence who are are not themselves the subject of the investigation—let me call them third-party searches—will also be included in our study. We have asked the U.S. attorneys to come back to us with some indication of how many of these searches there are, whether they use any different standards, whether they are aware of problems involved with them.

I would happily give the committee my own tentative reactions, but they are wide open while we study it.

I don't know if any record of complaints or abuse with regard to third-pary searches other than in about two narrow categories have ever been made. One is the press, and the other is medical records and perhaps legal records.

I am worried about how one would frame a broad requirement that we not search third parties, because I think most third parties who would have evidence, and again this is subject to revision in light of the evidence, most third parties who would have evidence are likely to be brothers, sisters, fathers, mothers, children of the suspect, loved ones, friends, and I think it's difficult, as a practical matter, to count on getting evidence voluntarily from such a relative or a loved one.

Even as a conceptual matter I am not crazy about the idea of asking a father to voluntarily turn over evidence on his son, or a child on its parents, or a sister on a brother. I am not sure there is a

greater civil liberties or greater respect for privacy in asking a close family member to cooperate in sending another close family member to jail.

Mr. KASTENMEIER. To conclude, the Department, I take it, is endorsing the approach taken by the Banking and Currency Committee with these two exceptions, notwithstanding reservations about the two areas of disagreement with the bill; are you, on balance, supporting that bill rather than opposing it in its present form?

Mr. HEYMANN. Mr. Chairman, I think we are talking about events that have taken place within the last 48 hours. I am not sure we have an answer to that and I think we would like to return to you on that.

Certainly we were very satisfied with the bill right up to the last two amendments. I think it would be better if we returned to you with our views in light of the two amendments.

Mr. KASTENMEIER. The gentleman from California does not have any questions, so let me thank you for your testimony. It was very helpful. We may need to get back to you again, I suspect, before this is finally disposed of.

Mr. HEYMANN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Mr. Pauley and Mr. Heymann, we are very pleased to have you in your initial appearance before our subcommittee.

Mr. HEYMANN. It has been a pleasure to be here.

Mr. KASTENMEIER. That concludes this morning's hearing and, accordingly, the subcommittee stands adjourned.

[Whereupon, at 11:30 a.m., the Subcommittee on Courts, Civil Liberties, and the Administration of Justice adjourned.]

BILL OF RIGHTS PROCEDURES ACT

THURSDAY, JULY 20, 1978

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:50 a.m., in room 2237, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Ertel, and Railsback.

Also present: Bruce A. Lehman, counsel; Timothy A. Boggs, professional staff member; Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. This morning we will continue hearings on H.R. 214, the Bill of Rights Procedures Act.

The Committee on Banking, Finance and Urban Affairs has reported favorably legislation which is similar to title I of H.R. 214, and we are pleased to greet as our first witness this morning, Mr. Richard Davis, who is Assistant Secretary of the Treasury. Mr. Davis is chiefly responsible for the law enforcement functions of the Department.

We are very pleased to have you here, Mr. Davis. You may proceed as you wish.

TESTIMONY OF RICHARD DAVIS, ASSISTANT SECRETARY FOR ENFORCEMENT AND OPERATIONS, U.S. DEPARTMENT OF THE TREASURY

Mr. DAVIS. Thank you, Mr. Chairman. I have submitted a statement to the committee and, with the Chair's permission, what I would like to do is summarize that statement.

Mr. KASTENMEIER. Yes; and your prepared statement in full will be accepted for the record and you may proceed as you wish.

[The prepared statement of Mr. Davis follows:]

STATEMENT BY HON. RICHARD J. DAVIS, ASSISTANT SECRETARY OF THE TREASURY

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to appear before you today in order to present the views of the Department of the Treasury concerning H.R. 214, the Bill of Rights Procedures Act. While I will refer to the other Titles, the focus of my testimony will be on Title I of this bill. This Title would substantially affect the manner in which government agencies may obtain access to bank, credit, and telephone toll records. It would create a legally recognized right of individuals, corporations and other associations in any such records which pertain to them, but are in the possession of third parties.

The general approach taken by this Title would be to bar government access to these records until the individual or association has an opportunity to object to their production and whenever such an objection is interposed, until the government prevails in a judicial proceeding.

The issues of government access and privacy raised by this Title have been matters of controversy for some time. This is largely due to the fact that they appear to bring into confrontation two highly desirable goals—the need for a system of government which enables its citizens to be and feel free from unnecessary official scrutiny, and the need for a system of justice which protects our citizens against violence, assassination, corruption, fraud and other criminal activities in as effective and efficient a manner as possible.

Because of legitimate and deep concerns over achieving this latter goal the Executive Branch has in earlier Administrations simply opposed virtually all proposals such as those contained in Title I. We no longer do so. The Treasury Department has spent much time in recent months discussing this issue and, along with the Department of Justice, we are prepared to support legislation incorporating the principles of Title I, although we believe that certain amendments are essential in order to place the law enforcement-privacy goals in proper balance. We have not, however, come to this position because we believe that adoption of our proposal will be cost free for our enforcement type activities—we recognize, as you should, that it has the potential for a certain amount of investigative delay and loss and will put some added burdens on our courts and prosecutors. We are prepared to support this course of action instead because we believe it responds to a genuine need to provide added safeguards against the erosion of the privacy of our citizens, while meeting the essential needs of our law enforcement and regulatory agencies.

As Assistant Attorney General Heymann has previously told this Subcommittee, the Justice and Treasury Departments recently have had occasion to offer draft legislation incorporating our position to another Committee considering legislation similar to Title I. A copy of that draft has been submitted to this Subcommittee for its consideration. Before discussing the principal provisions of this proposal, however, I would like briefly to articulate with more specificity some of the underlying, and in part competing, principles and concerns which Treasury sought to balance in developing its position on this matter.

First, as I mentioned previously, we accept the validity of the need to provide protection for financial records. It is necessary to develop more clearly stated rules governing access to financial records. In the mere adoption of rules greater discipline is introduced into the record acquisition system, reducing intrusions into private records which are only of marginal value to investigators. Also, we recognize that whatever rules are established some instances of abuse are possible. It is thus desirable that any proposal provide an opportunity for those instances to be identified and remedied.

Second, and certainly central to consideration of this issue, is a desire in selecting the appropriate rules to minimize any genuine risk to the performance of the missions of Treasury's various agencies. Treasury currently has agencies with diverse responsibilities—protecting the President and Vice President of the United States, as well as visiting heads of State; guarding against smuggling and customs fraud; enforcing our tax laws; regulating national banks; administering laws concerning blocked assets and economic sanctions; regulating the liquor industry; and enforcing laws involving dumping, currency transactions, counterfeiting, forgery and the illegal use of firearms and explosives are just some examples. Many of these responsibilities have special needs. As an example, in protecting the President speed without notice to those involved is often critical. For all, however, it is important that any proposals recognize that undue delay may mean lost leads and diminished momentum. Similarly, in all cases, care must be taken that procedures to regulate access do not mean that in actual practice there is no access to information which is legitimately needed. Also, it is necessary to consider the reality of many criminal investigations—the risks of flight and illegal obstruction of inquiries and the danger to individuals in particular situations.

Third, we believe it appropriate to minimize the impact of these proposals on the criminal justice system as a whole. The trial and pretrial stage—when a case is actually pending—has generally been the time when questions about the investigative phase were litigated. Therefore, the extent to which there is more routine judicial intervention in this earlier stage adds to the burdens being placed on an already congested judicial system. Opportunities to litigate and generate delay in the investigative phase also may lengthen further a process which many believe

already takes too long for all involved. Additionally, at a time when we are striving to enhance interagency cooperation and avoid duplicative efforts it seems desirable that an approach be avoided that routinely mandates repetitive investigations or otherwise unnecessarily complicates our criminal justice system. We are not unmindful of the fact that adding too much to the burden on the various aspects of the criminal justice system runs the risk of lessening the speed and quality of justice felt by the many who get caught up in that system.

These then, briefly, were some of the underlying concerns which we considered, and which we urge this Subcommittee to consider. I would now like to highlight some aspects of the proposal which we support. Assistant Attorney General Heymann has already articulated many of the key issues and we join in the statement he submitted to you last week.

CHALLENGE PROCEDURES

Among the most important aspects of the Justice-Treasury proposal is a modification of the challenge procedures from those contained in H.R. 214. We strongly believe that generally investigations require speedy access to records. This is necessary, among other reasons, so that leads can be pursued in a timely fashion before evidentiary trails become more difficult to follow or disappear; so that investigative momentum can be maintained; and so that the large volume of matters involved can be handled in an efficient fashion. In order to accommodate this need we have offered several suggestions.

Initially we believe that the time period in which a customer may act to prevent access should be relatively short and that a time limit should be established by which the Judge must decide the matter. Also, it is important that appeals by customers from adverse rulings should not be allowed during the investigative phase. To do so would generate an opportunity for delay which could stymie particular investigations. Instead, we believe it sufficient to allow appellate remedies to be pursued after the completion of the investigation. Our proposals contain provisions implementing these proposals.

An additional major change in this aspect of our proposal would be to place on the customer the initial requirement of going forward to prevent the government from gaining access to the customer's record. H.R. 214, in the case of administrative subpoenas and summonses, would enable someone to prevent access simply by objecting to the government agency. This is the same general approach taken in the Tax Reform Act of 1976. While experience under that statute is still insufficiently complete to provide much guidance, it does appear so far that this approach invites the interposition of frivolous or casual objections which accomplishes no more than the generating of delay and adding to the government's workload. We would require more of a customer who wishes to object to government access. In essence we suggest that a customer be required to file with the appropriate court a simple affidavit and motion to quash setting forth the basis for the objection to the access. Of course, once the customer makes a showing that access may be improper, the government should have the burden of proving that access to the records is being sought for a legitimate law enforcement purpose.

Other provisions in our proposal would toll relevant statutes of limitations while challenges are being processed; require recordkeepers to process requests during the notice period; and authorize *in camera* showings by the government. These suggestions are designed to avoid provisions designed to enhance privacy from being misused simply to generate delay or obtain otherwise unauthorized criminal discovery.

ACCESS THROUGH PROCESS REQUIREMENT

A principal aspect of H.R. 214 would prohibit all access to financial records except by legal process and thereby eliminate any ability to obtain "informal" access to such records. What this proposal fails to consider, however, is that many investigative agencies which have legitimate need for access to such materials in various of their investigations have no summons authority. If such a rule was adopted, the impact on Treasury agencies would be substantial. The Secret Service totally lacks summons power; the Bureau of Alcohol, Tobacco and Firearms has it only for tax and Federal Alcohol Administration Act cases, not for firearms or explosives investigations; Customs has it for most, but not all its investigative jurisdiction as does the Office of Foreign Assets Control; and the IRS lacks it for its critical internal affairs anti-corruption efforts.

If the requirements of H.R. 214 are unchanged many necessary inquiries—ranging from forgery to threats on our elected leaders to bribery of IRS employees—would be seriously impeded. An available alternative would, of course, be the earlier use of grand jury procedures where it is necessary to obtain access to financial records. We believe that to force such reliance on the grand jury is unwise. It invites abuse of the grand jury system; it means that minor matters which would otherwise be resolved without a grand jury inquiry will be forced into the system; it will adversely impact the ability of investigative agencies to organize their workload; and would place added and unnecessary burdens on both prosecutors and the grand jury. Additionally, the grand jury is not available where the inquiry is civil and not criminal.

If H.R. 214, or similar legislation, is adopted either necessary administrative summons power should be conferred on agencies needing it or an alternative procedure must be created. The Justice-Treasury proposal chooses the latter alternative. We urge that there be a formalization of "informal" agency access by requiring the use of written requests by agencies that lack summons power alternative. We urge that there be a formalization of "informal" agency requiring the use of written requests by agencies that lack summons power. These requests would be issued under regulations promulgated by agency heads and would be subject to the notice and challenge provisions of this legislation.

Of course, third party recordkeepers would not be required to produce records pursuant to a written request—they would instead be permitted to do so. Like the Justice Department, however, our support for this procedure is based upon our belief that recordkeepers, who would not be liable for good faith reliance on government representations, would be prepared to cooperate with legitimate inquiries.

EXCEPTIONS

While accepting the general concept contained in H.R. 214, we believe that certain exceptions are necessary from the notice and challenge provisions. These exceptions are of two kinds—first from only the pre-notice provisions, and second, from the requirements of notice altogether.

We believe that delayed notice is required in several general situations. The first relates to emergency situations where immediate access is required if injury to person or property or flight is to be avoided. This exception is particularly important where the matter relates to an ongoing crime, such as the kidnapping situation referred to by Assistant Attorney General Heymann in his testimony. In these situations no impediment to immediate access should be allowed and notice can be provided after the fact.

We also are concerned that in certain other circumstances provision be allowed for notice to be delayed until after access is obtained. This exception should operate in those circumstances where there is reason to believe that giving notice would (1) endanger life or physical safety, (2) cause flight from prosecution, (3) cause the destruction of evidence, (4) result in witness intimidation or (5) otherwise jeopardize an investigation, trial, or ongoing official proceeding. In these circumstances the government agency seeking the delay would be required to seek a court order authorizing it to do so. We feel strongly, however, that the opportunity for delayed notice where these showings can be made is important since in the everyday world of criminal investigations the potential for these consequences is real. While generally we agree that delays under this provision should be for specified time periods, in one circumstance we believe it important that the court have the authority to grant indefinite delays. This circumstance involves disclosures of records obtained by the Office of Foreign Assets Control in the course of its investigation. In these cases the owner of the account may be a foreign national—of, for example, Vietnam or Cambodia—and notification to the owner may also mean that the involved government may learn of its existence, subjecting the owner or those associated with the owner to risks of physical reprisal. If the Court finds such a risk exists, delay should be indefinite.

In some circumstances, we believe that it is unnecessary to require even delayed notice. One such situation is where the information being sought is only the name, address, account number, and type of account of any customer or ascertainable group of customers associated with a financial tranacation. This exception thus covers only what is on the account signature card—if information about actual transactions in the account is sought the notice provisions would fully apply.

This exception is intended to reach two kinds of situations. First, it would cover those situations where a forged check or other instrument has been processed by the financial institution. In these circumstances the fact of the criminality is

apparent but this account information is necessary to pursue the inquiry. This would involve a relatively large number of routine inquiries now made by letter to banks during the course of the many forgery investigations by the Secret Service. To impose the notice requirement in this situation would, we believe, unnecessarily complicate this relatively simple process without materially enhancing the privacy interests involved.

This section would also reach circumstances where the government had information that an illegal transaction had taken place, but it did not know the particular account involved. Thus, for example, upon learning that a large amount of cash generated by a criminal activity had been deposited in a particular bank the government would be able through use of process or formal written request to identify the account involved. Again, however, in order to examine transactions in the account the government agency would have to comply with the notice provisions.

Another exception in our proposal to the notice requirement is when access to records is sought by the Secret Service for the purpose of conducting its protective responsibilities, or when access is in connection with conducting foreign counter or positive intelligence activities. We believe that in these circumstances even after the fact notice would be very harmful to the execution of these responsibilities. In these circumstances the agency involved would certify to the financial institutions that grounds for an exception exist and the institution would be prohibited from notifying its customer that access has been obtained.

Finally, we believe that this Title need not apply when the records are being sought in an inquiry or proceeding directed at the financial institution itself. This would involve "redlining" or other similar investigations. In such a circumstance any conceivable privacy right of the customers involved is clearly outweighed by the burden and cost of giving hundreds or thousands of customers notice, standing and an opportunity to litigate in a case where their interest in the underlying case is highly speculative.

MISCELLANEOUS PROVISIONS

As I noted above, we support the various modifications reflected in Mr. Heymann's testimony and in the draft legislation submitted to this Committee. In particular, we share the Justice Department's belief that information lawfully obtained may have legitimate uses apart from the purposes for which it was originally obtained. It is, we believe, unnecessary and would add unneeded burdens to require each agency to resubpoena the same records. We believe, therefore, that this Committee should not amend the Privacy Act in this legislation. We are particularly concerned that H.R. 214 as drafted would prohibit the routine referral of investigative matters from investigative agencies to the Justice Department for prosecution, would inhibit the conducing of joint investigations and would prevent the transfer of information even when it contains evidence of a crime within the investigative jurisdiction of another agency. We also believe that this proposal should not prohibit the bank supervisory agencies from exchanging information with other bank supervisory agencies since all share a common responsibility.

Our proposal also adds to the list of supervisory agencies the Secretary of the Treasury with respect to the Bank Secrecy and Currency and Foreign Transactions Reporting Acts. Under these laws the Secretary is required to monitor the compliance of financial institutions with the requirements of those statutes. Thus, in that instance, the Secretary has responsibilities equivalent to the bank regulatory agencies themselves.

Finally, we concur with the views previously expressed by the Justice Department concerning the penalty provisions of Title IV, the uncertainty as to the desirability of including telephone toll records in the current legislation, the exclusion of the grand jury, and the limiting of this proposal to natural persons and not to corporations and other legal entities. Similarly, we also share their view that Congress should not be excluded from the provisions of this Bill as is now the case under Title V.

TITLES II–III

Title II of H.R. 214 refers to mail covers. We concur with the views expressed by the Department of Justice on this issue. We believe, however, that the statute should include as a basis for mail covers investigations conducted by the Secret Service in connection with its protective responsibilities.

Title III relates to electronic surveillance conducted pursuant to 18 U.S.C. § 2510 et. seq. As to these matters, the Treasury Department is considering whether to seek an added amendment to 18 U.S.C. § 2516 to include certain statutes enforced by the Customs Service. No decision has yet been made on this point by the Department.

Title III also includes an amendment to Section 2516 which would regulate supervisory observing of employees. The Internal Revenue Service does do some monitoring of this type. We belicve that this telephone monitoring is essential to the IRS to ensure quality control of service to the public by taxpayer service and collection personnel. Where telephones are clearly marked as subject to monitoring and monitoring policy is known to employees through written training materials, their privacy interests are adequately protected. We are concerned that requiring duplicative special consents by employees would be impracticable because employees might unreasonably withhold such consents and frustrate our quality control program. The language of thc Bill should thus be clarified to eliminate the implication that any notice other than that contained in the training materials is required.

We have no position on the other issues raised by this Title.

This concludes my prepared statement and I will be happy to try to answer any questions you may have.

Mr. DAVIS. Thank you, Mr. Chairman, Mr. Ertel.

I think the issue that we are here discussing today, that relating to the privacy of financial and other records, is a very important issue. It is an issue that has evoked considerable controversy over a number of years. I think, unfortunately, in some of the controversy the issue has been set up as a battle of good versus evil, with various sides feeling that the good and the evil are in different places. We at the Treasury Department think that is not the way this issue should be looked at and analyzed because, in fact, the nature of this controversy is so difficult, because it does involve attempting to resolve two positive and two desirable goals:

The first goal is that our citizens be and feel free from official scrutiny beyond that which is necessary. That is a highly desirable goal.

The second is that our citizens be and feel free from the prospect of criminal activity, whether it be in the form of fraud, crimes of violence, assassination, or the like. It is important, because these are two desirable goals, to find some sort of balance.

The current practices are largely, we believe, insufficient; they tend to provide rules and guidance for none of the parties concerned.

In previous Congresses and in previous administrations the reaction of the executive branch has been to oppose virtually all legislation such as H.R. 214 on the grounds that no balance could be struck. We do not agree with that and we believe that a balance can be struck. The Treasury Department, working with the Justice Department, has developed a proposal which was submitted to this committee by Assistant Attorney General Heymann last week, and the Treasury Department fully supports and endorses both that proposal and the statement of Assistant Attorney General Heymann.

The proposal adopts the basic premise and concept of H.R. 214 concerning the fact that there is a right of privacy in financial records in the possession of third parties and that right of privacy attaches to the person whom those records are about. We believe, however, as Mr. Heymann testified, that certain amendments are necessary in order to put the balance, we think, in a slightly different position.

In coming to this position it is not because we think the proposals are "cost-free"—I put that in quotes—for the law enforcement community. It is true that I think that these proposals will involve some losses and some delays. We just think that the proposals that we put forward will minimize those and will provide for the ability of the law enforcement organizations to carry out their primary and important functions while at the same time meeting, and filling, the void in terms of the privacy interest.

Before going to the specific proposals, I just want to briefly articulate some of the concerns and some of the issues which we looked at in coming to our position. These are set out in more detail in my statement.

First, as I said at the outset, one of our basic underlying principles was the fact that rules themselves are a guard against marginal intrusions which really may not be necessary and can be avoided. Also, in having rules, both the enforcer and the citizen will be in a position of knowing more fully and completely what their rights are.

Second, we believe that any proposal should provide an opportunity to identify and remedy possible abuses which might develop. I say possible abuses because I think it is one of the unfortunate realities of law enforcement that with the best of systems to avoid them there are going to be cases at some point in which some step is going to be taken which will require corrective action.

At the same time we believe it is important, that any proposals assure the ability of our enforcement agencies to carry forward their basic responsibilities and that any delays not be unnecessarily long. Delays themselves can cause a loss of important leads and of investigative momentum. Investigative momentum is a concept that is hard to explain. It is something I have seen as a prosecutor. What investigative momentum means in a good sense in terms is just the ability to do an investigation correctly, and I think that is an important consideration.

Second, we think it is important that in creating rules we make sure that we are not prohibiting access to agencies which need it and that we are making provision for such access; and that is particularly important to the Treasury Department, since various of our agencies in some or all of their functions do not have statutory administrative summons power.

Third, we think it is important that the proposals recognize some of the basic and unfortunate realities of the criminal justice involving the risks to witnesses, the risks of destruction of evidence and the like.

Fourth, we think it is important to consider the impact of any proposals on the criminal justice system as a whole. We have a criminal justice system now which is justifiably criticized for being cumbersome and generating delay and being lengthy for all concerned. That is not in the interest, we believe, of the public; nor is it in the interest of all those people who are involved in the system.

So, therefore, we think in trying to develop an approach it is important to try and minimize whatever impact might be felt on the judicial system and reduce to the bare minimum the added burdens placed on courts and prosecutors.

With these in mind, as I said, we have agreed with the Justice Department in supporting the proposal submitted and described by Assistant Attorney General Heymann.

Again, my statement goes through many of the points that he made and my statement highlights some of the amendments that we think are important. Those amendments are in the areas of challenge procedures, in terms of adjusting time limits, in terms of making it clear that this would be an interlocutory order so that the appeal process would not unnecessarily delay an investigation.

We have most significantly recommended that there be some additional responsibility on the citizen seeking to object to agency access to financial records pertaining to that person to take some initial action. Therefore we would require in our proposal that the citizen file a very simple affidavit and a simple motion in court to start the process. It has been our experience, although the experience has been somewhat limited, under the Tax Reform Act of 1976, that it appears in many instances, where all that is necessary is an objection to the Government agency involved, that really not well grounded objections are being made and unnecessary delays are being put into the system. Therefore, we would require the person involved to file a relatively simple piece of paper and have some burden of going forward. We think that that would be a very important step in accommodating the various needs and principles that we discussed previously.

Of course, once the person goes forward and once it is in court, ultimately it will be the responsibility of the Government to establish that this information is necessary because there is reason to believe that it is relevant to legitimate law enforcement function.

A second principal point that is discussed in my statement relates to the need to provide for those agencies who do not have summons power. For the Treasury Department, that covers the Secret Service in all its responsibilities; that covers the Internal Revenue Service in terms of its very important internal affairs responsibilities, in terms of monitoring the problem of bribery of agents of the Internal Revenue Service; it covers certain aspects of the responsibilities of ATF; it involves certain aspects of the responsibilities of the Customs Service.

All of these agencies in various regards do not have administrative summons power. Therefore, the proposal submitted by the Justice Department and the Treasury Department, to meet these needs, involves a formal, written request procedure which would recognize the formal requests and make those formal, written requests subject to the same procedures as the administrative summons.

An important difference, of course, is on a formal, written request, even if the Government should prevail vis-a-vis the citizen the records pertain to, the third party who holds those records would be allowed to respond to the written request but would not be compelled to as if it were a summons or subpena.

Mr. KASTENMEIER. Mr. Davis, should these agencies which now do not have such power, be given administrative summons power?

Mr. DAVIS. I think that in a way, from our perspective, it probably would be better and easier to administer if they did have summons power.

One of our earlier thoughts in considering this is that merely giving them summons power and setting rules and guidelines as to when

that could be used would itself put the system of records acquisition into more recognized procedure. We think that it would be helpful if they had summons power. We recognize, however, that that involves a whole set of issues involving a large number of agencies where there will be disputes as to whether or not we want to give them compulsory summons power. We feel this alternative system is certainly acceptable and would be satisfactory from our point of view.

The third main area of my statement relating to our proposals covers the various exceptions that we believe are important, those in which both delayed notice would be appropriate and those very limited circumstances in which no notice would be appropriate.

One of those involves a particular Treasury concern—it relates to the need that there not be a notice requirement when all that is being sought is essentially account information—who is the holder of the account. We are particularly concerned because the Secret Service, for example, investigates check forgeries.

I think, in 1977, they had 125,000 forged checks. Many of those checks will go through an account. The Secret Service will actually have the check but will need to get some information from a bank as to whose account that went through. Right now, to deal with, as I I say, upward of 100,000 checks, they are able to do that by a written form letter.

In that situation the Service has the financial instrument involved and there is already a report of a forgery to that instrument. We think that that is a clear example where we would think it appropriate to avoid any unnecessary burdening of that relatively simple and not intrusive acquisition of some basic information necessary to go forward with this kind of investigation.

The discussion of the other exceptions is contained in my statement.

Another aspect that we view as important—and we do ask for an exception—is where the Secret Service is acting in connection with its protective responsibilities. We think in that situation there are dangers in various cases in having any notice at all; but I would defer for more discussion on this issue, since it is not too dissimilar from the discussion contained in Mr. Heymann's previous testimony to my statement.

That outlines the statement which I have submitted to the committee as it relates to title I.

Our positions on title II and title III are very short. On title II we essentially support the Justice Department position as relates to mail covers and largely defer to the next witness this committee is going to hear from the Postal Service. On title III we generally take no position but refer very briefly to one practice that the Internal Revenue Service uses in terms of supervisory observing of its taxpayer assistance program and its collection program where employees are, in fact, notified that this kind of supervisory observing is going on.

That concludes my opening remarks and I would be happy to try and answer any questions that you or any members of the committee might have.

Mr. KASTENMEIER. Thank you, Mr. Davis.

I have a number of questions. I think I will yield to my colleagues first.

Does the gentleman from Pennsylvania, Mr. Ertel, have any questions?

Mr. ERTEL. Thank you, Mr. Chairman. I have no questions of this witness at this point.

Mr. KASTENMEIER. The gentleman from Illinois?

Mr. RAILSBACK. I think I would like to hear your questions.

Mr. KASTENMEIER. As to mail covers, you have very little comment on title II obviously.

First of all, I should ask you, Mr. Davis, may we assume that your testimony reflects the position of all the constituent agencies of the Treasury Department, including IRS and the Alcohol, Tobacco, and Firearms Division?

Mr. DAVIS. Yes; it represents the testimony of the Treasury Department and all its constituent agencies.

Mr. KASTENMEIER. Do these constituent parts of the Treasury Department or the Treasury Department itself use mail covers for purposes of investigation?

Mr. DAVIS. There is some use of mail covers. Now I do not have a number but in each of the instances the bureaus instruct their agents about the current Postal Service regulations and require, obviously, strict adherence to those.

Mr. KASTENMEIER. The reason I ask is, while the Postal Service will, of course, address itself to this, the Treasury Department may be in a different position. Indeed, the Justice Department may be in yet another position. The Postal Service not only for its own purposes uses mail covers, but surely it has to administer mail covers, so it has special responsibilities. You don't have that. You would be a user of the tactic, presumably, and would have possibly a different point of view from the Postal Service.

Mr. DAVIS. We only would have the one responsibility and that is why generally we feel that we can work with the current postal regulations from a user point of view. We do not have an objection to the proposals contained in H.R. 214, but as a general matter, since the postal authorities are the ones that have the ultimate responsibility for assuring that any system is properly implemented, we would generally defer to them on the details of that issue.

Mr. KASTENMEIER. Do you believe H.R. 214, as amended by your proposed suggestions would be a preferable means of handling the privacy if third-party-held records to the present privacy provisions of the Tax Reform Act of 1976 on a comparative basis?

Mr. DAVIS. Here I am going to draw a little bit of a distinction between IRS and the rest of Treasury. IRS right now is doing its own study of the comparison because they are just concerned over the fact of having just switched to the Tax Reform Act, whether it is desirable to now switch to a new system if this bill or a similar bill is enacted. Generally, however, Treasury believes that this is a better system and we all believe, including the IRS, that an important improvement in this system is the fact that it places some initial responsibility—and we don't feel it is a very heavy burden but some initial responsibility—on the individual citizen to go forward and file a relatively simple form of affidavit. We believe and hope in that way that the casual objector—the one who because he gets a letter that says if you object, something won't happen, without thinking about it really just says, "I object"—can be avoided.

We are not sure that any system avoids the planned, frivolous objection. By that I mean if somebody really, with the design of delaying an investigation, wants to do everything that person can—and that happens in some criminal investigations—probably they could file the motion just simply. But, we think that our proposal would reduce substantially nonmeritorious objections, and particularly for that casual objector. So we think that is an important difference.

We think generally also that the time limits, and the way this treats the appeal issue are also desirable. Our proposed preserves appellate rights until after the investigation is completed, and if the investigation produces a lawsuit, a criminal indictment or a trial, enabling the person to include any appellate rights that accrue at this early stage and appeal from any final report judgment. If there is not lawsuit filed, we provide for a later time to appeal. These are also important improvements over the Tax Reform Act in terms of preventing possible delay.

So I think over all the Treasury Department believes that this is a better approach than the Tax Reform Act.

The IRS, because it has just gotten its people used to one system, is now studying what it really feels about whether it really wants to make a switch to another system.

As you know, the bill reported out by the Banking Committee would authorize continued use of 7609, the Tax Reform Act.

Mr. KASTENMEIER. In view of the fact that that is the second bell and an important vote, we will have to recess the committee for 10 minutes, Mr. Davis. I regret having to do that. We will reconvene in 10 minutes.

Accordingly, the subcommittee stands in recess.

[Brief recess.]

Mr. KASTENMEIER. The committee will come to order.

Mr. Davis, to open another subject, why do you feel a special exemption is needed for the Secret Service in their efforts to protect Presidents?

Mr. DAVIS. I think that there are two reasons: One is why delay is required and, two, why no notice is required. One, upon receipt of information as to a possible threat or upon investigation of some incident or person who may be a threat to the President or one of the other protectees of the Secret Service, which also covers visiting heads of state among others, generally, great speed is necessary. Geat speed is necessary because information is often of a very general nature, and it is important to act quickly.

Secondly—and, I think, in a way more importantly—it is, I believe, an unfortunate reality that in many of the situations those involved in threats on the President are those with a history of mental illness.

Now, I don't mean to suggest because somebody has a history of mental illness, they are a danger to the President; I mean that if you look at the class of people who have made threats, there is a high percentage in that category.

In that situation we are concerned about providing notice at all because of the uncertainty of the reaction to finding out of Secret Service interest in a particular individual. In some situations, that

may be a deterrence to action; in other situations, that may be a stimulus to some sort of action and, unfortunately, sometimes it is very difficult to have any great predictability in that.

Mr. KASTENMEIER. You are referring to notice after the fact?

Mr. DAVIS. That is correct. People do things for a variety of reasons. As I say, sometimes you are talking about a situation where becoming aware of Secret Service interest can stimulate interest in the particular individual in acting or thinking of acting or making additional threats. It becomes a very complicated problem.

We think that we should, within the Service and from the Treasury Department, Department to Service, monitor very carefully the standards and the criteria and the methods by which any of these investigations are conducted; and we on a regular basis meet to discuss these. I think that in that particular situation this is sufficient. And we believe for the reasons of speed and the other reasons I have just articulated, that the exemption for the Secret Service in connection with its protective responsibilities only is necessary.

Mr. KASTENMEIER. Have you independently concluded what types of records ought to be included or covered by the protections of title I; that is to say, credit records, telephone toll records, bank records, medical records?

Mr. DAVIS. We have concluded that the bank and financial records of that type should mainly be covered. As to toll records, we endorse or join in Mr. Heymann's caution, which largely was premised on——

Mr. KASTENMEIER. Why would you be cautious about telephone toll records?

Mr. DAVIS. I think the caution had a little bit of "let us wait and see how the system works before we put a lot more into it." When I say caution, that was the kind of caution. I think there is a distinction in terms of telephone toll records and financial records. When you look at a checking account, you look at the actual transactions, particularly if you look at underlying documents. That can give you much more substantive knowledge about a person's habits than if you look at a toll record. A toll record gives you some. I don't mean to suggest that there is not a privacy interest there. I am just saying in the spectrum, looking at the toll record gives you information that a particular number was called. That it seems to me lesser than looking at the bank records. the underlying transaction records in a bank account at the same time.

Therefore, we think that bank records plainly, yes; and as to the credit card records, in the bill originally suggested by the Treasury Department and the Justice Department, we urged there not be credit card records included, largely because we were concerned not so much about American Express but a definitional problem that could come up with every department store that runs a credit card system; but we are really not—I don't know how to phrase this—not very seriously opposed to the way that turned out in the Banking Committee; and on the telephone records would endorse the Justice Department's view.

In terms of other records, as a general matter we think it is true that as you expand the number of records, depending on what you are including, you are expanding the potential impact on the system itself. More records and more agencies becoming involved would contribute to larger numbers of cases which in itself could be a problem. We think there we should look at it on a record-by-record basis.

Plainly, medical records are an area where there is a very strong privacy interest, but I think in terms of the Treasury Department's position we have to come to a position as to exactly how we would want to handle that. Plainly there should be some protection, but in terms of an official position as to whether we think we need any particular relief or exception, we have not come to that view yet.

Mr. KASTENMEIER. Mr. Davis, as one who would proceed with caution, it would seem just the reverse, that you would opt for subjecting medical records and telephone toll records to some sort of title I coverage but wait a bit on credit and bank, since that would impact—to use your word—on your activities far more than telephone toll or medical.

Basically, you don't often seek those other records, but very often you do seek bank records, and to a lesser extent credit records. Isn't that true?

Mr. DAVIS. I think that is correct.

In think bank records are the type of records which has the largest use, and from the perspective of the testing phase, I think that you are correct.

On the other hand, because it is a large use, there is also a greater or very strong demand that there be some protection. Because bank records are very frequently gone to by investigative agencies, so there has been a feeling that there should be some protection. We, in looking at the proposed legislation which focused largely on credit and bank records, were prepared to come up with a solution to that real problem.

I think what I am saying is, in terms of other records we probably would look at them on a record-by-record basis.

We support the Justice Department's position as far as other types of records. We do not have an official position yet.

Mr. KASTENMEIER. One last question: It relates to the exception you request for disclosure of records obtained by the Office of Foreign Assets Control.

What sort of situation were you talking about on page 7 of your statement?

Mr. DAVIS. There are two provisions linked to foreign assets control that we are interested in. One relates to a variation on the court-order notice. We are not talking about a situation in that particular case where they do not have to go to court. We are talking about where they go to court and obtain a delay, that there should be a recognition that in some circumstances that delay should be indefinite.

The circumstance we are thinking about is where the owner of an account is a foreign national, which is very often the case, because what you are talking about is blocked accounts in this country.

Now it may well be it is a blocked account owned by a Cambodian, or a Vietnamese, or some other national. In that situation it would be very difficult for some period of time to provide notice to that person without really providing notice to that government. And we are concerned about retribution against that individual because that may be an account that government doesn't know about. So we are talking about a situation where foreign assets control can make that showing to the court, that in that circumstance there should be an opportunity for indefinite notice.

Mr. KASTENMEIER. Aside from that sort of situation, would you agree, if you are familiar with the administration's foreign intelligence surveillance bill and its broad privacy protection, not only citizens but also resident aliens and even foreign visitors, would you say that by analogy that these protections ought to reach a similar group of people?

Mr. DAVIS. While I am familiar with the Foreign Intelligence Act, I am not prepared in all its aspects. In terms of whether the provision of H.R. 214 or the Justice-Treasury proposal should reach noncitizens, I think that we begin with the premise that we feel most strongly about citizens and then resident aliens. But at least insofar as people who are in this country, so that there is an opportunity to meaningfully comply with notice provisions of the act, so the system can work, so you can really provide notice, I do not see an objection to including them. By doing so you have the advantage of getting as much uniformity in application of the system as possible, which is a desirable goal.

Mr. KASTENMEIER. I want to thank you on behalf of the committee, Mr. Davis, for your testimony today, and your help with the legislation before us.

Perhaps we will have further occasion to be in touch with you in reference to it. Thank you, sir.

Mr. DAVIS. We would be happy to work with the committee on this and any other matters.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Next, the Chair would like to call Assistant Chief Postal Inspector, the Honorable Paul G. Coe.

Mr. Coe, welcome.

Mr. Coe, you have a rather brief statement, actually.

TESTIMONY OF PAUL G. COE, ASSISTANT CHIEF POSTAL INSPECTOR FOR CRIMINAL INVESTIGATIONS, U.S. POSTAL SERVICE, ACCOMPANIED BY CHARLES R. BRAUN, ASSISTANT GENERAL COUNSEL, SPECIAL PROJECTS DIVISION, LAW DEPARTMENT, USPS

Mr. COE. Yes, sir. I would like to read it for the record.

Mr. KASTENMEIER. There is no reason why you shouldn't proceed from it.

Mr. COE. Thank you.

Mr. Chairman and members, I am Paul G. Coe, Assistant Chief Postal Inspector, Criminal Investigations. Accompanying me is Mr. Charles R. Braun, Assistant General Counsel, Special Projects Division, Law Department.

It is a pleasure for me to meet with you today to discuss H.R. 214, the proposed Bill of Rights Procedures Act of 1977.

The interest of the Postal Service in this legislation centers on title II of the bill which would enact certain guidelines for the use of mail covers. Title II would enact a statutory definition of the term "mail cover" and specify the authorities who may authorize the use of this investigative technique. It would establish criteria for judging whether grounds for the use of a mail cover exist; it would limit the time for which a mail cover may be conducted and it would establish remedies for the improper initiation of a mail cover.

In general, we believe that the guidelines for the use of mail covers which would be established by this legislation are acceptable; however, as I will explain, we believe that some modification of the bill is necessary.

It is possible that the provisions of proposed sections 2 (a) and (b) of title II of the bill dealing with the authority of the Attorney General may not promote uniform administrative policies regarding mail covers. Under these provisions the Attorney General can make an independent determination regarding the necessity for a mail cover and could take the position that the Chief Postal Inspector is required to authorize the cover to be placed into effect without information as to the basis for the Attorney General's determinatoin.

The bill is somewhat unclear as to whether the Attorney General must supply the Chief Postal Inspector with the information supporting the Attorney General's determination under the bill that the mail cover was necessary or even that the Attorney General specify whether the mail cover is required in the investigation of a felony or in the location of a fugitive.

Although we trust that as a standard practice the Attorney General would supply information of this type with any request for the authorization of a mail cover—and we believe that we could require the submission of such information under the bill—nothing in section 2 explicitly assures us that the Attorney General would agree with our interpretation of the bill in this regard.

Without adequate information regarding the need for and the purpose of a mail cover instituted at the request of the Attorney General, the Postal Inspection Service would be unable adequately to perform its duty under sections 6 and 7 of title II to maintain records concerning mail-cover requests and to make a full and complete annual report to Congress concerning mail covers.

In this regard, we note that the proposed legislation would not impose any corresponding recordkeeping and reporting requirements on the Attorney General concerning the mail covers requested by that official under section 2(a) of title II.

The Postal Inspection Service does not desire to exercise a veto over mail-cover requests supported by the Attorney General's determination that one is necessary; however, as an obvious defendant in any lawsuit charging improper initiating of a mail cover, and as the component of the Postal Service responsible for reporting to Congress on mail covers, the Inspection Service has a considerable interest in being apprised of the background and purposes of any proposed mail cover before it is placed into effect.

We believe the orderly administration of the mail cover statute will be enhanced, the possibilities of abuse of mail covers will be minimized and the level of recordkeeping and reporting concerning mail covers will be improved by clarification of this point, perhaps by an amendment of section 2 to require adequate supporting information to be furnished to the Chief Postal Inspector with any mail cover request from the Attorney General.

Accordingly, we suggest that section 2(a) of title II of the proposed legislation be amended by adding, immediately after the words, "United States Attorney General," the words, "and if supplied with a

copy of the affidavit on which the Attorney General has based his determination that the mail cover is necessary."

I think it may also be desirable to add a provision to the bill allowing a reasonable amount of time—say, 180 days—for the Postal Service to conduct a public rulemaking to change its mail-cover regulations to implement title II.

If this bill passes without an effective date provision, title II will become effective on the date of enactment and postal regulations inconsistent with the law will be immediately invalidated.

Legal and administrative questions may arise during the transitional period in which the law was in effect and public rulemaking procedures to change the regulations were in process.

We suggest, in the interest of improved administration, a provision be added to the bill, such as the following: "Title II of this act shall become effective within 180 days after its enactment on the date established therefor by the Postal Service and published by it in the Federal Register."

This concludes my prepared statement.

I would like to take the liberty to comment a little bit more on mail covers. Several months ago we furnished the committee with a rather lengthy document on mail covers. I believe it is available. If it is not, we would be glad to leave a copy with the committee.

The document explains what a mail cover is; it goes into the purpose of the mail cover; it addresses their availability as a tool to other law enforcement agencies; it spells out our current requirements for obtaining a mail cover; it also addresses the supervisory control that we maintain over the administration of a mail cover; it addresses recordkeeping procedures that we now have in effect; it addresses the legality of mail covers and decisions of the court where it has been challenged; and it also provides a history of the use of the mail covers and procedures.

The use of the mail cover is very important to law enforecment, not only to the Postal Inspection Service but also to other law enforcement agencies. It is used in connection with investigations involving national security, espionage, sabotage, illegal mailing, or smuggling of drugs, narcotics and firearms, pornographic dealers, mail fraud, income tax violation, organized crime, and racketeering.

I have some statistics that may be of interest. I won't bore you with a lot of detailed statistics but in calendar year 1977 the Postal Inspection Service, in investigation of postal violations—felony violations, I might add—authorized 1,662 mail covers in cases pertaining to fraud; controlled substances in the mail; fugitives; theft of mail; obscenity; firearms; possession, forgery, and uttering a Government obligation; explosives; extortion; embezzlement; and lottery.

We authorized a total of 1,923 mail covers for 19 other Federal agencies, 16 State agencies, and 4 county and local agencies. We also authorized 115 mail covers in connection with national security investigations.

Mr. KASTENMEIER. How many?

Mr. COE. 115. These were at the request of the FBI or the Department of Defense.

That totals exactly 3,700 mail covers in calendar year 1977.

To give you an idea of our concern about the use of mail covers and to demonstrate the controls we have established in authorizing them, the 3,700 figure for 1977 is down from a high of 5,169 which were authorized in 1973. At the same time there has been an increase in the number of times we have refused to authorize covers.

In fiscal year 1977, we refused 504 requests because we felt they did not satisfy our criteria for authorization. This alone does not give the total picture on the effect of our controls.

Because of our regulations, there have been an unknown number of instances where the agency did not request a cover.

As I say, I do have detailed statistics. But they are not in proper order to leave with you today. I will be glad to furnish them later if you desire.

Mr. KASTENMEIER. Yes; when you do have them available for submission, I would appreciate it, Mr. Coe, if you would submit these additional statistics to the committee.

Mr. COE. I'd be very happy to.

[The information follows:]

CHIEF POSTAL INSPECTOR,
Washington, D.C., August 9, 1978.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: This replies to your request for certain statistical information on mail covers made to Assistant Chief Inspector Paul G. Coe, who testified before your subcommittee on July 20, 1978, concerning H.R. 214, "The Bill of Rights Procedures Act."

Attachment I shows the total number of mail covers approved or disapproved since fiscal year 1971 and separates national security covers from all others. As you will notice, the number of mail covers approved has steadily declined since fiscal year 1973. Attachments II and II–A list the agencies that have requested mail covers and the number requested, including national security covers. The statistical information depicted on Attachment III illustrates the number of cases (32 of 56 surveyed) for which the length of time elapsed between termination of the mail cover and commencement of prosecutorial action (*i.e.*, indictment issued or information filed) exceeded 90 days.

Mail covers are often used in those cases requiring a substantial amount of investigative time, *e.g.*, Postal Service mail fraud cases, and complex investigations conducted by the Federal Bureau of Investigation, Internal Revenue Service, and the Drug Enforcement Agency (see Attachment II), with the greater part of the investigative effort taking place after termination of the cover. In addition, the material obtained from a mail cover often forms the basis for broadening the scope of an investigation of providing new investigative leads, thereby extending the length of the investigation.

While the survey shown by Attachment III represents only Inspection Service cases, we have reason to believe that the same results would be found in a survey of non-Inspection Service requests for mail covers. We are concerned that in reaction to the proposed 90-day notice requirement in section 5 of the bill, agencies might successfully delay notification of the subject or delay the request for a judicial waiver simply by seeking an extension of the mail cover to the maximum time available. In order to avoid such a possible abuse of the legislation, we suggest that consideration be given to extending the period of notification to 270 days since we believe that, in most cases, the individual will have been formally charged during this period.

Sincerely,

C. NEIL BENSON,
Chief Postal Inspector.

Attachments.

MAIL COVERS APPROVED/DISAPPROVED

[By fiscal year]

	1971	1972	1973	1974	1975	[1] 1976	1977
Approved:							
National Security	179	182	359	359	223	151	125
Inspection Service	2,339	1,925	1,623	1,617	1,120	1,593	1,762
Other agencies	2,524	2,421	3,187	2,633	2,356	2,020	1,709
Total	5,042	4,528	5,169	4,609	3,699	3,764	3,596
Disapproved	48		133	123	498	481	504

[1] Five quarters (includes transitional quarter).

MAIL COVER STATISTICS BY AGENCY

[Calendar Year 1977]

	January–March	April–June	July–September	October–December	Total
APPROVED					
Postal Inspection Service:					
Fraud	186	[1] 613	276	171	1,246
Controlled substance	42	43	54	17	156
Fugitive	45	28	9	5	87
Theft	18	49	7	12	86
Obscenity	4	32	17	16	69
Firearms	1				1
Possession, forgery, uttering	1				1
Explosives	4				4
Extortion			6		6
Embezzlement			4	1	5
Lottery				1	1
Total	301	765	373	223	1,662
Federal agencies:					
Air Force—Office of Special Investigations	2	1			3
Army—Criminal Investigations Command		1			1
Navy—Naval Investigations Command		4	2	1	7
Drug Enforcement Administration	58	59	54	63	234
Federal Bureau of Investigation	25	38	27	17	107
Immigration-Naturalization Service		1		1	2
U.S. Marshals Service	2	4	2	2	10
Alcohol, Tobacco, and Firearms	6	1	3	1	11
Customs	23	43	6	10	82
Internal Revenue Service	308	228	193	135	864
Secret Service	8	2	4	10	24
U.S. Attorney	12			[2] 210	222
Department of Agriculture	1			4	5
Interstate Commerce Commission		1			1
U.S. Coast Guard Intelligence			1		1
Department of Labor			1		1
U.S. Marine Corps				2	2
Department of Revenue and Taxation—Guam				1	1
Department of Commerce—National Marine Fisheries				2	2
State agencies:					
State police	17	5	5	13	40
Department of corrections	2		2		4
Department of justice	6	3	1		10
Bureau of drug control	1				1
Office of law enforcement	2	3			5
State's attorney	1	1	2		4
Bureau of investigations		1			1
Bureau of family services		2			2
Drug law enforcement			33	2	35
Securities commission			1	1	2
Attorney general			1		1
Bureau of welfare				1	1
State department				1	1
Department of motor vehicles				2	2
Department of business regulation				1	1
Bureau of narcotics and drug enforcement				6	6
County/local agencies:					
Police/sheriff	43	51	38	21	153
District attorney/county prosecutor	31	13	7	14	65
Department of public safety		8			8
Department of social services	1				1
Total	549	470	383	521	1,923

[1] Besides 13 covers placed in fraud investigations (ATL) 38 corporate names at 6 addresses for 2 periods were covered.
[2] Fraudulent bank account investigation, western district of Pennsylvania.

MAIL COVERS APPROVED IN THE INTEREST OF NATIONAL SECURITY

[Calendar year 1977]

	January–March	April–June	July–September	October–December	Total
Approved:					
Federal Bureau of Investigation	21	20	34	23	98
Air Force—Office of Special Investigation	9	4			13
Army—Criminal Investigation Command					
Navy—Naval Investigation Command			2	1	3
Royal Canadian Mounted Police			1		1
	30	24	37	24	115

PROSECUTORIAL ACTION IN POSTAL INSPECTION CASES TAKEN SUBSEQUENT TO TERMINATION OF THE MAIL COVER [1]

[Fiscal years 1975–78]

	Number of months					
	1 to 3	4 to 6	7 to 9	10 to 12	Over 12	Total
Number of cases	24	13	12	3	4	56
Percent of total	42.86	23.21	21.43	5.36	7.14	100

[1] These statistics were accumulated in a survey of fraud cases conducted in the five Inspection Service regions. However, due to the limited time to compile the material, and for other reasons, 98 cases were reviewed. Fugitive mail covers were eliminated from the survey since the subjects of the mail covers (friends and relatives of the fugitive) are not themselves targeted for prosecution. We are inclined to believe the 90-day period would be too short as to fugitive mail covers. However, we are not sure what period would be more appropriate. We also eliminated from the survey cases in which mail covers were terminated recently and no indictment has as yet been obtained.

Mr. COE. That concludes my statement. I would be willing to answer any questions.

Mr. KASTENMEIER. Thank you for very brief but very constructive and helpful testimony.

I must say, listening to your testimony, I agree with you, that if we are going to place certain burdens of reporting on the Postal Service, then we will have to change that language with respect to the Attorney General's submissions to you; and your additional suggestion about transition time, for example, 180 days, is also a point well taken, and I appreciate those, I think, very constructive comments.

Your statistics are also edifying.

I would have thought that the use of mail covers might have diminished a bit.

In terms of national security, does the Department of Defense have any particular authorization for law enforcement? Is it in connection with deserters and AWOL's, or how does the Department of Defense figure in as far as law enforcement is concerned?

Mr. COE. I do not have the details on what those requests were. I do have them broken down by agency. In 1971 we honored 13 requests from the Air Force. I would have to check to see what exact types of cases they were.

Mr. KASTENMEIER. I didn't realize that they resorted to investigations themselves. I would have thought that they would have placed investigations perhaps through the FBI; but we can take that up directly with them.

Mr. COE. The bulk of them, Mr. Chairman, did come from the FBI; 98 of the 115 came from the FBI, 13 from the Air Force, 3 from Naval Command, 1 from the Royal Canadian Mounted Police.

Mr. KASTENMEIER. Two years ago, Chief Inspector Cotter testified before the subcommittee and he said at that time, and I quote:

> I welcome guidance of some sort as to what standards I should use in making my judgment with regard to a national security mail cover.

May I ask you today, Mr. Coe, is the Postal Inspection Service still in need of guidance on national security mail covers?

Mr. COE. I would think it would be helpful, Mr. Chairman.

Mr. KASTENMEIER. What standards, really, do you presently employ?

Mr. COE. When we receive a request for a national security mail cover, we do not require supporting data. With regard to other mail cover requests, we do require the agency—under existing regulations—to advise us of the statute that is involved, so that we can be assured it is indeed a felony offense.

We require the agency to furnish advice whether the person who is the subject of the cover has an attorney; whether he is under indictment, and so forth. We do not impose these requirements in national security matters.

Mr. KASTENMEIER. That is precisely why I raise the question, because it is a peculiarly vulnerable area for abuse. Mr. Cotter testified 2 years ago, as to not only mail covers but also mail openings, which became a national scandal in the sense of subsequent revelations.

On another topic, may I ask you, in reviewing the bill, whether you think that section 5 notice provisions will interfere with any legitimate law enforcement investigations of the Postal Service?

Mr. COE. If I may, Mr. Chairman, that is something I would like to address in a followup letter.

Mr. KASTENMEIER. All right.

Mr. COE. Due to the short period preceding this testimony, I am not totally prepared to take exception to the 90-day notice period. However, I am somewhat concerned that 90 days may be too restrictive. I would like to have the opportunity to evaluate the situation before making a firm recommendation.

Mail covers are generally used in very lengthy investigations; it is not uncommon for an investigation to require at least a year before it is ready for prosecutive action. The use of the mail cover usually comes early in the investigation. While I don't want to be unduly concerned without some supportive data, I am fearful that it would be necessary to request the court in almost every instance for an exception if the 90-day limit is retained.

After proper review, we may request by letter that consideration be given to extending the notice period. We have no objection to the requirement to provide notification; however, we think it advisable to consider an extension of that time. The short time limit will have an administrative effect on the Postal Inspection Service, and while I can't speak for the courts, it seems to me it would cause a burden on the court that might be even more significant.

Mr. KASTENMEIER. Well, you initiated in 1977 1,662 mail covers?

Mr. COE. Yes, sir.

Mr. KASTENMEIER. In your reply you might allude to that figure in terms of the time the covers were effective, and that might also aid us in determining what your own interests would be in whether the term were 90 days or any other period of time.

Mr. COE. Yes. Any analysis we would make along that line would have to relate to the cases that we investigate. I don't think we can do that for other agencies, but we could for the Postal Service.

Mr. KASTENMEIER. I understand that.

In addition to the notice requirement, one of the other differences between present practice and the bill is the number of postal inspectors that would be authorized to approve mail covers, and I know this was part of the discussion back in early markup 2 years ago, and in that regard do you believe that this limitation will interefere with the necessary mail-cover approvals?

Mr. COE. I believe that the limitation down to the postal inspector-in-charge level as outlined in the bill is proper.

Mr. KASTENMEIER. I had hoped that you would agree, because actually many of these provisions as they appear in H.R. 214 were worked out with the Postal Service at that time, 2 years ago, and the Postal Service made a number of suggestions, and we tried to reconcile differences about this within the bill; so that I would have hoped that the level of postal inspectors authorized would be adequate for your purposes.

Mr. COE. I believe it is adequate. I would not like to see the level of authorization reduced. Requests for mail covers go to the inspectors in charge. They are reviewed at the regional chief inspector level, and we have on occasion canceled mail covers where in the judgment of the regional chief or the chief inspector, they were not proper. We do exercise veto power, but it is necessary, I think, to have the authorization at the field level. To restrict it further would impede investigations where prompt action is necessary.

Mr. KASTENMEIER. I want to thank you, Mr. Coe, for your appearance this morning, and Mr. Braun, as well, for accompanying you; and we will be in further touch with you with respect to some of the data and materials which you will furnish us.

We appreciate your testimony.

Mr. COE. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. That concludes the testimony for this morning on this matter.

The hearings are concluded and today's hearing is adjourned.

[Whereupon, at 11:05 a.m., the hearing was concluded and the subcommittee was adjourned.]

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